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FOREWORD

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D. Djukić*

* Any views expressed in this study are those of the author alone and do not reflect the views of the International Criminal Court.

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
Ad Hoc Tribunals	ICTY and ICTR
ASEAN	Association of Southeast Asian Nations
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
MICT	International Residual Mechanism for Criminal Tribunals
Protocol 7 ECHR	Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights

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INTRODUCTION

Rights of appeal have become an indispensable feature of most systems of criminal procedure on the domestic level. Modern jurisdictions almost invariably provide for one (or multiple) stage(s) of appellate review of a criminal conviction for two primary reasons.[1] On the one hand, it constitutes a mechanism for the development and homogenisation of the law. Appellate courts have resolved indeterminate questions of law and have conclusively settled conflicting output of courts in the lower echelons of the judiciary. On the other hand, appellate review is envisioned as a (final) safeguard against judgments possibly tainted by legal or factual errors. A criminal appeal allows a convicted person to seek to have his conviction and/or sentence mitigated or even overturned, whilst particular constructs of the appellate process also permit prosecutors to request an acquittal to be vacated and/or a sentence to be aggravated. It, thus, entails imperative individual and communal ramifications, considering that it attempts to contribute to the differentiation between the guilty and the innocent. The latter function has been entrenched in international human rights law.[2] Following the Second World War, the right to appeal afforded to a person standing trial on criminal charges has been recognised in international and regional human rights instruments.[3]

Despite its importance, appellate review may stand in tension with the principle of finality, which requires all litigation to come to an end. The protraction of criminal proceedings may call into question victims' confidence that justice will be served.[4] Furthermore, the possibility of seeking a renewed assessment by a higher court may convey the impression that judicial decisions may be called into doubt, which may lead to mistrust in the judicial process as opposed to reassurance that successive assessments lead to the correct outcome.[5] The right to appeal is, thus, also characterised by a balancing exercise between the need to allow a conviction, sentence, or acquittal to be challenged for the sake of factual and legal accuracy and the need to adopt a decision that cannot be disturbed because of legal certainty.

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[1] Also: Part I, Chapter 1.2; Part II, Chapter 1.2.
[2] It has been famously noted that, "[i]n the real world of practice and procedure, there is no such entity as 'International Human Rights Law'". I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), at 530. However, no legal definition has been assigned this term in this study. It is merely used for ease of reference.
[3] Part II, Chapter 1.1.
[4] D. Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission', 37(1) *The University of New South Wales Law Journal* 270 (2014), at 281.
[5] Ibid.

However, the attention devoted to the right to appeal in international criminal law is incommensurate with the importance attached to this right in domestic systems and international human rights law. The International Military Tribunals sitting in Nuremberg and Tokyo, established for the trial of the leadership of Nazi Germany and Imperial Japan after the Second World War, envisaged a single level criminal trial.[6] Thereafter, appellate proceedings have commanded appreciably less interest compared to other issues in the foundational phases of the Ad Hoc Tribunals and the ICC. In this regard, it has been noted that, "[i]n drafting rules on international criminal procedure, the matter of appellate proceedings tends to receive scant attention", since "it is not considered a pressing issue when these courts are being set up".[7] Such negotiations may involve diplomatic compromise and "creative ambiguity",[8] which has often been interpreted as an invitation to the judges to develop the law.[9] However, the judges of the Appeals Chambers of the Ad Hoc Tribunals have not managed to generate conceptual clarity in respect of certain critical facets of the appellate process. Two issues are emblematic in this regard. The powers of the Ad Hoc Appeals Chambers to substitute an acquittal for a conviction or to impose an aggravated sentence without the possibility of having recourse to a higher instance has been the subject of an intense exchange of views between individual judges. On the one hand, it has been argued that such powers contravene standards of international human rights law concerning the right to appeal.[10] On the other hand, it has been contended that such powers conform to the exceptions to the right to appeal recognised in international law.[11] Although the Ad Hoc Appeals Chambers have routinely imposed convictions in lieu of acquittals and/or increased sentences from the outset, they only explicitly decided that they possess the powers to do so in the closing stages of their mandates.[12] Disagreement between the judges concerning the

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[6] Art. 26 Charter International Military Tribunal (Nuremberg); Arts. 15, 17 Charter International Military Tribunal for the Far East (Tokyo) (omitting the possibility to appeal).
[7] L. O'Neill and G. Sluiter, 'The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia', 10(2) *Melbourne Journal of International Law* 596 (2009), at 628.
[8] D. Hunt, 'The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges', 2(1) *Journal of International Criminal Justice* 56 (2004), at 58.
[9] C. Safferling, *International Criminal Procedure* (Oxford: Oxford University Press, 2012), at 50-51.
[10] Dissenting and Partially Dissenting Opinions of Judge Pocar in: Rutaganda, at 2-3; Mrkšić & Šljivančanin, at 1-13; Semanza, at 1-4; Setako, at 1-6; Gatete, at 1-5; and Popović et al., at 2. Unless otherwise stated, references to cases in the footnotes of this study refer to appellate judgments from first instance judgments on acquittal, conviction, and/or sentence adopted by Trial Chambers of the Ad Hoc Tribunals or the ICC.
[11] Separate Opinions of Judge Shahabuddeen in: Rutaganda, at 1-40; Semanza (with Judge Güney), at 1-9. Similar: Šainović et al., Dissenting Opinion of Judge Ramaroson, at 5; Galić, Separate and Partially Dissenting Opinion of Judge Schomburg, at 3.
[12] Gatete, at 265; Gotovina, at 107 (footnote 314); Đorđević, at 928; Popović et al., at 539.

required scope of appellate review concerning questions of fact[13] and the standard of review applicable to errors of fact based on additional evidence[14] has further marred the jurisprudence of the Ad Hoc Appeals Chambers. Judges advocating for a wide approach to appellate review of questions of fact arising out of the record of the trial proceedings or additional evidence presented before the Appeals Chamber have clashed with those in favour of a more restrictive stance. This division reflects the aforementioned tension inherent in appellate proceedings between, on the one hand, factual and legal accuracy and, on the other hand, the principle of finality. Whilst the early appellate jurisprudence of the ICC has not revealed such divisions, similar issues may come to affect its appellate process too. In this regard, the ICC Appeals Chamber has held that it may order a "new trial or […] *reverse the acquittal and enter a conviction*".[15] Furthermore, a judge of the ICC Appeals Chamber has criticised the extent to which a decisive question of fact has been reviewed by the ICC Appeals Chamber,[16] which signals a commitment to a wider scope of review.

Over and above the lack of clarity in the practical application of international criminal law, neither the general topic of criminal appeals nor the controversial aspects of the jurisprudence of the Ad Hoc Appeals Chambers have received treatment proportionate to their significance in legal scholarship. In this regard, it has, for instance, been written that "very little scholarly attention has been given to the subject of criminal appeals".[17] Moreover, academic articles that attend to this subject matter often relegate it to secondary importance.[18]

1. Research Question

The preceding considerations have provided the impetus for this study. It aims to fill a void in respect of a subject that, despite its critical implications for international criminal process, has been insufficiently considered in scholarship and practice. In more specific terms, it seeks to contribute to the elucidation of controversial aspects of the appellate proceedings of the Ad

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[13] E.g., Muvunyi II, Dissenting Opinion of Judges Liu and Meron, at 7-8; Nchamihigo, Partly Dissenting Opinion of Judge Pocar, at 8; Ntabakuze, Joint Dissenting Opinion of Judges Pocar and Liu, at 2; Popović et al., Separate and Dissenting Opinions of Judge Mandiaye Niang, at 11 (footnote 3).
[14] Blaškić, Partial Dissenting Opinion of Judge Weinberg De Roca; Kordić & Čerkez, Separate Opinion of Judge Weinberg de Roca; Kvočka et al., Separate Opinion of Judge Weinberg De Roca; Kvočka et al., Separate Opinion of Judge Shahabuddeen.
[15] Ngudjolo, at 284 (emphasis supplied).
[16] Lubanga, Dissenting Opinion of Judge Anita Ušacka, at 50-51.
[17] P. Marshall, 'A Comparative Analysis of the Right to Appeal', 22(1) *Duke Journal of Comparative & International Law* 1 (2011), at 1.
[18] E.g., C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', 1(3) *Journal of International Criminal Justice* 603, at 614.

Hoc Tribunals, which may arise in the context of the ICC's appellate proceedings too, and attempts, on a broader level, to assess appellate proceedings conducted in international criminal law in a more comprehensive manner. Accordingly, this study may, in the main, be typified as "[e]valuative scholarship", which "is in some way providing an assessment of the way the (legal) world is, and, either implicitly or explicitly, subjecting the law to appraisal […] from the point of view of coherence with […] other areas of law, […] and where shortfalls are identified, suggesting how things might be improved".[19]

In light of the foregoing, the following research question is central to this study: "*against which standards should the appellate proceedings of the Ad Hoc Tribunals and the ICC be assessed and have the Ad Hoc Tribunals and the ICC conducted and adjudicated appeals taken from first instance judgments and/or sentences in accordance with such standards?*"

This research question imposes three fundamental limitations.[20] First and foremost, this study considers the law as it exists (that is *de lege lata*) as opposed to the law as it is proposed (that is *de lege ferenda*).[21] In view of the aforementioned practical ambiguities infusing the appellate proceedings of the Ad Hoc Tribunals and potentially the ICC, this research corresponds to the need to define the relevant benchmarks for such proceedings, map the law and practice relevant to appeals before the Ad Hoc Tribunals and the ICC, and contrast the former against the latter to determine possible inadequacies and, if necessary, propose adjustments. This also means that this study does not pretend to provide an exhaustive assessment of the fairness of the appellate procedures of the Ad Hoc Tribunals and the ICC. As set forth in more detail hereinafter,[22] it will contrast these procedures against standards of customary international law (derived from domestic systems of criminal procedure) and/or

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[19] R. Cryer, T. Hervey, B. Sokhi-Bulley, and A. Bohm, *Research Methodologies in EU and International Law* (Oxford: Hart Publishing, 2011), at 9. It is understood that this type of research encapsulates elements of other types of legal research, such as "descriptive", "comparative", and "normative" research. These labels have been employed separately by others. See: e.g., Editors (prepared by S. Vasiliev), 'Introduction', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà, *International Criminal Procedure - Principles and Rules* 1 (Oxford: Oxford University Press, 2013), at 9-10. However, others have rejected some of these labels. See: e.g., M. van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline', in M. van Hoecke (ed.), *Methodologies of Legal Research. What Kind of Method for What kind of Discipline?* 1 (Oxford: Hart Publishing, 2011), at 4-11. Accordingly, this research does not adopt a particular position in this respect, but employs the label of "evaluative" research for ease of reference.

[20] Additional limitations will be discussed in the section on methodology. See: Introduction, Chapter 2.

[21] Also: R. Cryer, T. Hervey, B. Sokhi-Bulley, and A. Bohm, *Research Methodologies in EU and International Law* (Oxford: Hart Publishing, 2011), at 37-39; F. Coomans, F. Grünfeld, and M. Kamminga, 'A Primer', in F. Coomans, F. Grünfeld, and M. Kamminga (eds.), *Methods of Human Rights Researc*h 11 (Antwerp: Intersentia, 2009), at 16-17.

[22] Introduction, Chapter 2.1.1; Introduction, Chapter 2.1.2.

international human rights law (drawn from international and regional human rights instruments), which set generalizable and/or minimum touchstones of fairness in the criminal process.[23] Second, this study exclusively considers the appellate practice of the Ad Hoc Tribunals[24] and the ICC. Accordingly, "mixed" tribunals will not be assessed. Whilst the Ad Hoc Tribunals and the ICC are international in character, seeing that they were established by the U.N. Security Council or by treaty, the former are "national court[s] of mixed jurisdiction and composition",[25] which combine international and national law in various manners[26]. Accordingly, the standards against which the appellate proceedings of courts falling in the latter category are to be measured are, in part, dependent on domestic arrangements. As such, this category requires a dissimilar assessment.[27] Finally, this research is confined to appeals taken from first instance judgments and/or sentences. The interlocutory appeal regime and post-appeal remedies of the Ad Hoc Tribunals and the ICC will therefore not be evaluated. The former determine contentious issues with finality during proceedings at first instance and could, on this basis, be seen to form part of the accused's right to have his final conviction and/or sentence reviewed in respect of specific matters.[28] However, international human rights law, as one of the pillars of international criminal procedure,[29] does not acknowledge the right to have every decision of a hierarchically subordinate court reviewed by a superior court. International and regional human rights instruments explicitly limit the object of appellate

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[23] E.g., M. Fedorova and G. Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings', 3(1) *Human Rights & International Legal Discourse* 9 (2009); F. Mégret, 'The Sources of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà, *International Criminal Procedure - Principles and Rules* 68 (Oxford: Oxford University Press, 2013), at 70-71.

[24] No specific distinction will be drawn between the Ad Hoc Tribunals and the MICT. The latter operates similar provisions and rules of procedure and evidence relevant to appellate proceedings in comparison with the Statutes and RPE of the Ad Hoc Tribunals (see: Arts. 23 MICT Statute and Rules 131-145 MICT RPE). Indeed, in relation to appellate proceedings, the MICT Appeals Chamber has found that "[t]he Statute and the Rules of the Mechanism reflect normative continuity with the Statutes and Rules of the ICTR and ICTY. The [MICT] Appeals Chamber considers that it is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTR and ICTY. Likewise, where the respective Rules or Statutes of the ICTR or ICTY are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them". See: Ngirabatware, at 6. Accordingly, for ease of reference, the ensuing sections will exclusively refer to the Ad Hoc Tribunals.

[25] D. Shraga, 'The Second Generation of UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in C. Romano, A. Nollkaemper, and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* 15 (Oxford: Oxford University Press, 2004), at 15.

[26] See: e.g., Arts. 5, 6(5), 14(2), 20(3) SCSL Statute; Sections 2-3 UNTAET/REG/1991/1 (Special Panel for Serious Crimes (East Timor)); Art. 12 ECCC Agreement; Art. 2 STL Statute; Arts. 3(2)-(3), 12-15, 25-26 Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office.

[27] E.g., L. O'Neill and G. Sluiter, 'The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia', 10(2) *Melbourne Journal of International Law* 596 (2009), at 628; G. Boas, J. Jackson, B. Roche, and D. Taylor III, 'Appeals, Reviews, and Reconsideration', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 939 (Oxford: Oxford University Press, 2013), at 943.

[28] Rules 72(B), 73(B) ICTY and ICTR RPE; Arts. 18(4), 19(6), 82 ICC Statute; Delalić et al., at 122.

[29] Introduction, Chapter 2.1.2.

review to either the "conviction and the sentence"[30] or "the judgement"[31], as confirmed by both the ICTY[32] and the ICC[33]. Interlocutory appeals must, thus, be appraised against a different yardstick.[34] The same reasoning applies to the latter, which consist of reconsideration[35] and review[36] (or revision[37]).[38]

2. Methodology

The focus on existing law (that is *de lege lata*) entails that this study draws its data from the classical sources of law. In the context of international law, these sources are, on a general level, reproduced in the ICJ Statute: "a. international conventions […]; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means […]".[39] However, the sources of international criminal procedure are not "entirely aligned" with the general sources of international law.[40] Two such discrepancies are relevant to this study. First, "actual binding rules of procedure typically take precedence over norms contained in any other source", which are "generally contained at least in part in the charter or statute of the tribunal itself".[41] Second, "international criminal tribunals […] will only look beyond the immediate sources

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[30] Art. 14(5) ICCPR. Art. 2(1) Protocol 7 ECHR mentions "the conviction *or* sentence" (emphasis supplied). See: Part II, Chapter 3.3.3.2; Part II, Chapter 5.1.4.7.1.
[31] Art. 8(2)(h) ACHR.
[32] Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, ICTY, Appeals Chamber, 22 November 1996, at 19.
[33] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, ICC, Appeals Chamber, 13 July 2006, at 38.
[34] However, where the existence of an appealable issue has not been certified or where the accused decides not to file an interlocutory appeal during the trial at first instance, an issue may become part of the final appeal against the conviction and/or sentence. See: e.g., Gacumbitsi, at 11-35. Such matters have not been excluded.
[35] In any event, the ICTY Appeals Chamber has found that reconsideration is inapplicable to a final judgment (Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", *Prosecutor v. Žigić*, Case No. IT-98-30/l-A, ICTY, Appeals Chamber, 26 June 2006, at 7, 9) While the ICC Appeals Chamber has clarified that it may depart from previous decisions (Reasons for the "Decision on the 'Request for the Recognition of the Right of Victims Authorized to Participate in the Case to Automatically Participate in any Interlocutory Appeal arising from the Case and, in the Alternative, Application to Participate in the Interlocutory Appeal against the Ninth Decision on Mr Gbagbo's Detention (ICC-02/11-01/15-134-Red3)'", *Prosecutor v. Gbagbo & Blé Goudé*, Case No. ICC-02/11-01/15, ICC, Appeals Chamber, 31 July 2015, at 14), it remains unclear whether it may reconsider decisions of conviction or acquittal.
[36] Art. 26 ICTY Statute; Art. 25 ICTR Statute.
[37] Art. 84 ICC Statute.
[38] Part II, Chapter 2.3.2; Part II, Chapter 3.3.2.
[39] Art. 38(1) ICJ Statute.
[40] F. Mégret, 'The Sources of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 68 (Oxford: Oxford University Press, 2013), at 68.
[41] Ibid., at 69.

such as statutes and rules of procedure and evidence in cases where there is a significant ambiguity", which may entail recourse to "treaty law" and "[c]ustomary international law".[42]

2.1. Fair Trial Standards Applicable to International Appellate Proceedings

In light of the foregoing, the collection and analysis of data relevant to this study may, in general terms, be described as follows.[43] The fair trial standards governing the appellate proceedings of the Ad Hoc Tribunals and the ICC will be defined on the basis of norms of customary international law and/or international human rights law.[44] The legal framework applicable to the appellate proceedings of the Ad Hoc Tribunals and the ICC, as well as the manner in which appeals taken from first instance judgments of conviction or acquittal and/or sentences have been conducted and adjudicated, will be mapped out pursuant to the relevant legal texts of these institutions and the Appeals Chambers' jurisprudence.

2.1.1. Customary International Law

Whereas the applicable law of the ICC specially refers to "the principles and rules of international law",[45] which refers, *inter alia,* "to customary international law",[46] the ICTY has found that "any time the Statute does not regulate a specific matter […], it falls to the […] [ICTY] to draw [*inter alia*] upon […] rules of customary international law", since "[i]t must be assumed that the draftspersons intended the Statute to be based on international law".[47] The identification of relevant rules of customary international law relevant to the appellate proceedings of the Ad Hoc Tribunals and the ICC is based on a comparative law approach. In this regard, it has been noted that "[t]he need for comparative law stems from the sources of international criminal law, to the extent that custom […] [is] partly based on national law".[48] It may be added that, as a matter of institutional design, international criminal procedure

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[42] Ibid., at 70-71.
[43] The cut-off date is 28 February 2017.
[44] Similar: Editors (prepared by S. Vasiliev), 'Introduction', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 1 (Oxford: Oxford University Press, 2013), at 27-28.
[45] Art. 21(1)(b) ICC Statute.
[46] A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1051 (Oxford: Oxford University Press, 2002), at 1071.
[47] Judgement, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, ICTY, Trial Chamber, 14 January 2000, at 591. Also: A. Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks', in M. Bergsmo (ed.), *Human Rights for the Downtrodden. Essays in Honour of Asbjørn Eide* 19 (Leiden: Brill Academic Publishers, 2003), at 19-20.
[48] M. Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law, Journal of International Criminal Justice', 1(1) *Journal of International Criminal Justice* 13 (2003), at 16.

coalesces elements from the major legal families of the world.[49] Therefore, comparative law ensures, in addition, a better understanding of the origins and guiding principles of the appellate frameworks of the Ad Hoc Tribunals and the ICC.[50]

The selection of jurisdictions to be compared has been inspired by three considerations. First, in order to achieve a fair representation of the most important families of law,[51] three jurisdictions belonging to the Common Law Tradition (namely England & Wales, the U.S., and South Africa)[52] and three jurisdictions pertaining to the Civil Law tradition (namely France, Germany, and Argentina)[53] have been studied. Second, so as to reflect the increasing blend between the Common Law and Civil Law traditions,[54] two jurisdictions have been examined that have adopted far-reaching judicial reforms inspired by the opposite legal tradition they originally belonged to (namely Italy and Russia).[55] Third, on a general level, eight jurisdictions have been selected to provide for a sufficiently wide and geographically diverse sample so as to allow for generalizable conclusions to be drawn as to the existence of rules of customary international law in respect of appellate review at second instance.

Furthermore, the choice for the particular facets of these systems' appellate proceedings to be assessed has been guided by three considerations. So as to approximate the context of the Ad Hoc Tribunals and the ICC, which operate a two-tier legal system,[56] only appellate review in second instance has been examined. Similarly, the crimes within the jurisdictions of the Ad Hoc Tribunals and the ICC are extremely serious and, therefore, this study is restricted to a consideration of domestic appellate processes concerning the most serious category of crimes according to domestic law.[57] Moreover, to allow for a meaningful comparison between the wide varieties of procedural systems, and to manage the scope of the research, the examination has been restricted to the essential features of appellate review in second

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[49] E.g., Erdemović, Separate and Dissenting Opinion of Judge Cassese, at 4.
[50] E.g., T. Weigend, 'Criminal Law and Criminal Procedure', in J. Smits (ed.), *Elgar Encyclopaedia of Comparative Law* 214 (Cheltenham: Edward Elgar Publishing, 2006), at 225.
[51] Similar: J. Spencer, 'Introduction', in M. Delmas-Marty and J. Spencer (eds.) *European Criminal Procedures* 1 (Cambridge: Cambridge University Press, 2002), at 3.
[52] Part I, Chapter 3.
[53] Part I, Chapter 2.
[54] Similar: J. Spencer, 'Introduction', in M. Delmas-Marty and J. Spencer (eds.) *European Criminal Procedures* 1 (Cambridge: Cambridge University Press, 2002), at 3-4.
[55] Part I, Chapter 4.
[56] Part III, Chapter 2.1.1.
[57] It is noteworthy that the appellate processes pertaining to different categories of crimes may differ in domestic jurisdictions. E.g., A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 371, 377-378 (England & Wales); Sections 312, 349(5) Code of Criminal Procedure 2014 (Germany).

instance.[58] Dependent on the context, these features are: the availability of appellate review, the parties entitled to a right to appeal, impediments to appellate review, the oral or written nature of the appellate procedure, the approaches to additional evidence on appeal, the scope of appellate review, the powers of appellate courts, and the functions of appellate review.[59]

2.1.2. International Human Rights Law

Whilst it is generally presumed that the Ad Hoc Tribunals and the ICC should adhere to fair trial standards developed in international human rights law,[60] it has proved less obvious how they are bound by such standards in legal terms. Nevertheless, despite contrary views,[61] the prevalent position among commentators is that these institutions are under a legal obligation to conduct their proceedings in accordance with international human rights law on the basis of their internal legal frameworks.[62] In respect of the Ad Hoc Tribunals, the foundational report of the U.N. Secretary-General explicitly mentions that "internationally recognized standards [regarding the rights of the accused] are, in particular, contained in article 14" ICCPR.[63] Indeed, the ICTY Appeals Chamber has considered that "[t]he fair trial guarantees in Article 14 […] [ICCPR] have been adopted almost verbatim in Article 21" ICTY Statute and "[o]ther fair trial guarantees appear in the [ICTY] Statute and the" RPE.[64] With regard to the ICC, its Statute specifically stipulates that the application and interpretation of the law of the ICC

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[58] Similar: Editors (prepared by S. Vasiliev), 'Introduction', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 1 (Oxford: Oxford University Press, 2013), at 28.

[59] In line with the focus on existing law (that is *de lege lata*), these specific assessments draw on the classical sources of law on the national level, that is "legislation, custom, adjudication by other courts and legal institutions". See: R. Cryer, T. Hervey, B. Sokhi-Bulley, and A. Bohm, *Research Methodologies in EU and International Law* (Oxford: Hart Publishing, 2011), at 38.

[60] E.g., U.N. Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704, 3 May 1993, at 106; G. Sluiter, 'International Criminal Proceedings and the Protection of Human Rights', 37(4) *New England Law Review* 935 (2002-2003), at 935.

[61] E.g., S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), at 1, 6-7; F. Mégret, 'Beyond 'Fairness' Understanding the Determinants of International Criminal Procedure', 14(1) *UCLA Journal of International Law and Foreign Affairs* 37 (2009), at 52.

[62] L. Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 74 (Oxford: Oxford University Press, 2013), at 82-83; M. Fedorova and G. Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings', 3(1) *Human Rights & International Legal Discourse* 9 (2009), at 18-20.

[63] U.N. Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704, 3 May 1993, at 106 (emphasis supplied). The Ad Hoc Tribunals have explicitly grounded the obligation to abide by international human rights law in the Secretary General Report. See: e.g., Delalić et al., at 604; ICTY, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, A/49/342 & S/1994/1007, 29 August 1994, at 22-26.

[64] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, ICTY, Appeals Chamber, 2 October 1995, at 46.

"must be consistent with internationally recognized human rights".[65] It has, moreover, been written that "[t]he provisions of the ICCPR have been thoroughly implemented in" the ICC system.[66] Besides conventional norms of international human rights law, "[d]ecisions of human rights jurisdictions are generally taken very seriously and their precedential value is in practice fully recognized" by the Ad Hoc Tribunals and the ICC, including the jurisprudence of the ECtHR and IACtHR.[67] Although "[t]here is no reason to doubt that customary norms on human rights apply to international organizations",[68] this study will limit its inquiry to the human rights obligations of the Ad Hoc Tribunals and the ICC arising out of their internal legal frameworks. The reason is that this basis is wider and therefore subsumes norms of international human rights law amounting to customary international law. In this regard, it has been remarked that "[a]rticle 21(3) of the ICC Statute […] does not single out custom as the sole source of human rights obligations within the ICC legal system" and the reference to "internationally recognized" human rights standards in the Report of the Secretary General on the establishment of the ICTY might mean "something more than custom".[69]

What is more, notwithstanding discordant understandings in the literature,[70] the large majority of commentators asserts that the human rights obligations of the Ad Hoc Tribunals and the ICC constitute *lex superior* vis-à-vis other norms. In this regard, it has been noted that, "[a]ccording to Article 21(3) ICC Statute, internationally recognized human rights take precedence over any other conflicting rule of the ICC legal system, including those laid out in the [ICC] Statute".[71] With regard to the Ad Hoc Tribunals, "hierarchically superior norms

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[65] Art. 21(3) ICC Statute. In addition, the ICC Appeals Chamber has found that "human rights underpin the [ICC] Statute; every aspect of it [and that] its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights". See: Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 14 December 2006, at 37.

[66] S. Zappalà, 'The Rights of the Accused', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1319 (Oxford: Oxford University Press, 2002), at 1353.

[67] L. Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 74 (Oxford: Oxford University Press, 2013), at 91.

[68] Ibid., at 81.

[69] Ibid., at 82-83.

[70] E.g., D. Akande, 'Sources of International Criminal Law', in A. Cassese (ed.), *Oxford Companion to International Criminal Justice* 41 (Oxford: Oxford University Press, 2009), at 41; G. Hafner and C. Binder, 'The Interpretation of Article 21 (3) ICC Statute. Opinion Reviewed', 9 *Austrian Review of International and European Law* 163 (2004), at 169-177.

[71] L. Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 74 (Oxford: Oxford University Press, 2013), at 81. Also: A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1051 (Oxford: Oxford University

may be derived either from the UN Charter [as the legal basis for their establishment] or from customary norms of an imperative character".[72] More broadly, such norms emanate from the fact that any derogations from customary international law only sort effect in States' "relations *inter se*", considering that they "have no power to strip individuals of their rights under international law", and "the fact that international organizations have international obligations" beyond their creators' control.[73]

Despite the prominent place of international human rights law in the internal legal frameworks of the Ad Hoc Tribunals and the ICC, the identification of norms of international human rights law relevant to their appellate proceedings contends with three difficulties.

First, the obligations of the Ad Hoc Tribunals and the ICC under human rights law have not been rigorously defined. In this regard, it has been written that the ICTY is not a "state and is not party to […] [human rights] instruments".[74] This applies equally to the ICTR and ICC. The lack of clarity as to the guiding human rights norms is exemplified by the diverging taxonomy employed by the Ad Hoc Tribunals, who have considered themselves bound by terms such as "recognised principles of human rights",[75] "internationally recognized standards of fundamental human rights",[76] and "generally accepted human rights norms".[77] In relation to the ICC, such a lack of clarity arises out of the absence of a definition of the reference to "internationally recognized human rights" in Article 21(3) ICC Statute.[78] This is further confirmed by the reliance of the Ad Hoc Tribunals and the ICC on a multiplicity of human rights instruments without a clear rationale. Whilst the ICCPR appears to be the most pertinent human rights instrument in the context of international criminal law on account of

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Press, 2002), at 1076-1082; G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* 285 (Leiden: Martinus Nijhoff Publishers, 2009), at 303.

[72] L. Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 74 (Oxford: Oxford University Press, 2013), at 83.

[73] Ibid., at 84.

[74] Galić, Separate Opinion of Judge Shahabuddeen, at 25.

[75] Delalić et al., at 604.

[76] Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, ICTY, Trial Chamber, 10 August 1995, at 25.

[77] Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. IT-98-44C-T, ICTR, Trial Chamber, 31 January 2007, at 45.

[78] D. Sheppard, 'The International Criminal Court and 'Internationally Recognised Human Rights': Understanding Article 21(3) of the Rome Statute', 10(1) *International Criminal Law Review* 43 (2010), at 44; G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* 285(Leiden: Martinus Nijhoff Publishers, 2009), at 301.

its global reach and wide-spread ratification, the Ad Hoc Tribunals and the ICC have extensively applied regional human rights instruments too (primarily the ECHR and ACHR)[79] without explicitly defining their binding authority.[80] Even so, as determined by the ICTR, regional human rights instruments do not bind the Ad Hoc Tribunals on their own accord.[81] This conclusion may be extended to the ICC on the basis of the same reasoning.[82]

Second, the norms of international human rights law applicable to appellate proceedings are multifarious and inconsistent. International and regional human rights instruments contain three different conceptions of the right to appeal.[83] Article 14(5) ICCPR stipulates that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Largely following the formulation of this provision, Article 2(1) Protocol 7 ECHR requires that "[e]veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal" and adds, in a separate sentence, that "[t]he exercise of this right, including the grounds on which it may be exercised, shall be governed by law". Dissimilarly to the ICCPR, however, it also sets forth exceptions to the right to appeal, which apply "in cases in which the person concerned was tried in the first instance by the highest tribunal or was

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[79] L. Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 74 (Oxford: Oxford University Press, 2013), at 89; G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* 285 (Leiden: Martinus Nijhoff Publishers, 2009), at 301.
[80] N. Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?', 11(1) *Human Rights Law Review* 91 (2011), at 109; D. Sheppard, 'The International Criminal Court and 'Internationally Recognised Human Rights': Understanding Article 21(3) of the Rome Statute', 10(1) *International Criminal Law Review* 43 (2010), at 52. However, see: Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, *Prosecutor v. Martić,* Case No. IT-95-11-AR73.2, ICTY, Appeals Chamber, 14 September 2006, at 18.
[81] Barayagwiza, at 40. Also: A. Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks', in M. Bergsmo (ed.), *Human Rights for the Downtrodden. Essays in Honour of Asbjørn Eide* 19 (Leiden: Brill Academic Publishers, 2003), at 50.
[82] G. Hafner and C. Binder, 'The Interpretation of Article 21 (3) ICC Statute. Opinion Reviewed', 9 *Austrian Review of International and European Law* 163 (2004), at 187
[83] Article 7(1)(a) ACHPR sets forth "[t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force", but, on a plain reading, this right does not directly concern a right to appeal a criminal conviction. The ACmHPR has significantly elucidated and expanded the fair trial norms contained in the ACHPR, including the right to appeal (ACmHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 24 October 2011, at A(2)(j), N(10)). However, this document does not constitute a regionally binding treaty. Furthermore, other regional human rights treaties or declarations do not recognise a right to appeal, as such. See: e.g., Arab Charter on Human Rights (Arts. 7-9); Charter of Fundamental Rights of the European Union (Arts. 47-48); and ASEAN Human Rights Declaration (Art. 20).

convicted following an appeal against acquittal".[84] Article 8(2)(h) ACHR sets forth "the right to appeal the judgment to a higher court". This conception of the right to appeal differs from the ICCPR and Protocol 7 ECHR in terms of wording and embedding. It is described more succinctly, since it omits the qualifiers "according to law" and "governed by law", the reference to the need to review the conviction and/or the sentence, and the exceptions set out in Protocol 7 ECHR. Furthermore, the right to appeal in Article 8 ACHR has not been assigned a separate paragraph in the fair trial clause, as is the case with the ICCPR, but forms part of the minimum guarantees applicable to a criminal trial.

The fact that a guarantee specific to the appellate phase of a criminal trial has been included in the corpus of fair trial norms in international human rights law suggests that the remaining fair trial guarantees control other phases of a criminal trial. However, although not apparent at first sight, other fair trial guarantees may entail a regulatory effect in relation to appellate proceedings too. Indeed, in addition to the right to appeal, the human rights monitoring bodies and courts have resorted to a multiplicity of fair trial guarantees. Two examples may be noted in this respect. The ECtHR has found that "a Contracting Party which provides for the possibility of an appeal is required to ensure that persons amenable to the law shall enjoy before the appellate court the fundamental guarantees contained in Article 6" ECHR, even though it had concluded that it could not base its analysis on Article 2 Protocol 7 ECHR because the State in question had not ratified this instrument.[85] It has been similarly remarked that the application of Article 6 ECHR to appellate proceedings curtails the margin of appreciation in respect of the right to appeal guaranteed by Protocol 7 ECHR.[86] Furthermore, the HRC has adjusted its approach to Article 14(5) ICCPR vis-à-vis a particular facet of appellate proceedings on the basis of ECtHR jurisprudence regarding Article 6 ECHR.[87]

Third, it has been noted that the extension of norms of international human rights law to the ICTY "has to be interpreted as itself authorising appropriate allowances to be made to reflect

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[84] Art. 2(2) Protocol 7 ECHR also foresees an exception to the right to appeal in respect of "offences of a minor character, as prescribed by law", but, in light of the nature and severity of the crimes within the jurisdictions of the ICC and the Ad Hoc Tribunals, this exception falls outside the scope of this research.
[85] Judgment, *Lalmahomed v. the Netherlands*, Application No. 26036/08, ECtHR, 22 February 2011, at 34-36. Similar: Judgment, *Castillo Petruzzi et al. v. Peru*, Series C. No. 59, IACtHR, 30 May 1999, at 161.
[86] S. Trechsel, 'Das Verflixte Siebente? Bemerkungen zum 7. Zusatzprotokoll zur EMRK', in M. Nowak, D. Steuer, and H. Tretter (eds.), *Fortschritt im Bewußtsein der Grund- und Menschenrechte, Festschrift für Felix Ermacora* 195 (Kehl: N.P. Engel Verlag, 1988), at 203.
[87] Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 7.8 (footnote 55), referring to: Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 33.

the differences between the […] [ICTY] and a state",[88] which applies, by the same token, to the ICTR and the ICC. In other words, even though the Ad Hoc Tribunals and ICC have often adhered to the letter of international human rights law, such norms have also been adjusted to the context in which the Ad Hoc Tribunals and ICC operate.[89] Such contextualisation has had diverse effects. For instance, in particular judgments, it has led to the adaptation of the meaning of facets of international human rights law to the specificities of international criminal law.[90] In another variation, it has entailed the upwards[91] or downwards[92] alteration of norms of international human rights law in international criminal law.

In light of the foregoing, this study will draw on the following norms of international human rights law relevant to appellate proceedings. In general, due to the inclusive approach of the Ad Hoc Tribunals and the ICC in respect of their obligations under international human rights law, both international and regional instruments, including the corresponding views and jurisprudence of human rights monitoring bodies and courts, will be considered. In more specific terms, beside the specific rights to appeal contained in international human rights law, this study will also address other fair trial guarantees relevant to appellate proceedings. These guarantees concern the general right to a fair trial applicable to criminal charges

[88] Galić, Separate Opinion of Judge Shahabuddeen, at 25. Similar: Judgment, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, ICTY, Trial Chamber, 22 February 2001, at 471.
[89] M. Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' 36(2) *North Carolina Journal of International Law and Commercial Regulation* 365 (2011), at 378-381; M. Damaška, 'Reflections on Fairness in International Criminal Justice', 10(3) *Journal of International Criminal Justice* 611 (2012), at 611-612; K. Zeegers, *International Criminal Tribunals and Human Rights. Adherence and Contextualization* (The Hague: T.M.C. Asser Press, 2016), at 97-103.
[90] For instance, in respect of the right to be tried by a court "established by law", the ICTY Appeals Chamber has found that the interpretation afforded to this term in the case law of the ECtHR, namely as a guarantee ensuring "that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature", is inapplicable on the international level, since "[i]t is clearly impossible to classify the organs of the United Nations into the […] divisions which exist in the national law of States". Another meaning of this term, i.e. that a court's "establishment must be in accordance with the rule of law" was found to be "the most sensible and most likely meaning […] in the context of international [criminal] law", considering that, for a tribunal such as the ICTY "to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments". See: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, ICTY, Appeals Chamber, 2 October 1995.at 43, 45. For a similar approach to equality of arms, see: Tadić, at 52.
[91] For example, comparing Article 67(1)(a) of the ICC Statute to corresponding provisions in, *inter alia,* Article 6(3)(a) ECHR, Article 14(3)(a), (f) ICCPR, and Article 8(2)(a) ACHR, the Appeals Chamber of the ICC found that "[t]here seems to have been an intention to grant to the accused before the Court, rights of a higher degree". See: Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", *Prosecutor v. Katanga,* ICC-01/04–01/07, ICC, Appeals Chamber, 27 May 2008, at 49.
[92] For example, the ICTR Appeals Chamber has found that, with regard to the right to be tried without undue delay, "because of the […] [ICTR's] mandate and of the inherent complexity of the cases before the […] [ICTR], it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts". See: Nahimana et al., at 1037. Also: Mugenzi & Mugiraneza, at 32.

(Articles 14(1) ICCPR, Article 6(1) ECHR, and Article 8(1) and 8(5) ACHR) and specific guarantees relevant to the determination of criminal proceedings (Article 14(3) ICCPR, Article 6(3) ECHR, and Article 8(2) ACHR).[93] This limitation arises out of the focus of this study on the procedural aspects of the appellate proceedings of the Ad Hoc Tribunals and the ICC. It, therefore, requires the exclusion of fair trial guarantees that may bear on the assessment of the merits of criminal charges,[94] that lack a sufficiently independent application in appellate proceedings,[95] that have been afforded to specific categories of persons,[96] or that regulate the post-appeal phase of criminal proceedings.[97] Therefore, norms of international human rights law controlling appellate proceedings must be pieced together on the basis of dissimilar understandings of the right to appeal and associated fair trial guarantees. Moreover, where such norms can be identified, it is necessary, in addition, to determine whether they require adjustment to the particular context of the Ad Hoc Tribunals and the ICC.

2.2. Appellate Proceedings before the Ad Hoc Tribunals and the ICC

The legal framework applicable to the appellate proceedings of the Ad Hoc Tribunals and the ICC and the manner in which appeals taken from first instance judgments and/or sentences have been conducted and/or adjudicated must be determined on the basis of two factors.

The former aspect necessitates a review of the legal provisions governing appellate proceedings before the Ad Hoc Tribunals and the ICC. This corpus of rules is, primarily, composed of the single and two provision(s) dedicated to this phase of the legal process in the

[93] However, as explained *infra,* these provisions have been invoked to varying degrees by the human rights monitoring bodies and courts in the context of appellate proceedings. See: Part II.
[94] For instance, on the basis of the right to be presumed innocence enshrined in Article 14(2) ICCPR, the HRC has held that applicants have not been afforded the benefit of the doubt where criminal proceedings, at first instance and on appeal, had failed to dispel reasonable doubt as to guilt (Views, *Arutyuniantz v. Uzbekistan*, Communication No. 971/2001, HRC, 30 March 2005, at 6.4-6.6; Views, *Ashurov v. Tajikistan*, Communication No. 1348/2005, HRC, 20 March 2007, at 6.7). Arts. 6(2) ECHR and 8(2) ACHR set forth corresponding rights.
[95] This concerns, first, the right to be tried without undue delay (Art. 14(3) ICCPR, Art. 6(1) ECHR, Art. 8(1) ACHR), which is mainly measured from the moment a person is charged until a non-appealable conviction is issued and is, in general, not directly dependent on the length of appellate proceedings, as such (see: e.g., Views, *Lubotu v. Zambia*, Communication No. 390/1990, HRC, 31 October 1995, at 7.3; Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999, at 66; Judgment, *Suárez-Rosero v. Ecuador*, Series C. No. 35, IACtHR, 12 November 1997, at 71-75). It is, second, relevant to the right not to be compelled to testify against oneself or to confess guilt, since such rights primarily pertain to pre-trial or first instance proceedings and are less directly applicable to appellate proceedings (Art. 14(3)(g) ICCPR, Art. 8(2)(g), 8(3) ACHR).
[96] Art. 14(4) ICCPR, which concerns "juvenile persons".
[97] Such rights concern the right to compensation (Art. 14(6) ICCPR; Art. 3 Protocol 7 ECHR) and the right not to be tried or punished twice (Art. 14(7) ICCPR, Art. 4 Protocol 7; Art. 8(4) ACHR).

Statutes of the Ad Hoc Tribunals and the ICC respectively,[98] the sets of Rules of Procedure and Evidence relative to appellate proceedings[99] and, in the case of the ICC, Regulations of the Court.[100] In addition, the judges of the Ad Hoc Tribunals have issued Practice Directions concerning appellate proceedings,[101] which address "detailed aspects of the conduct of proceedings".[102] The latter aspect requires an assessment of the entire body of jurisprudence of the Appeals Chambers, so as to evaluate how the legal framework has been operationalised.

The appellate procedures of the Ad Hoc Tribunals and the ICC will be assessed in a roughly chronological manner. Accordingly, the following components of the appellate machineries of the Ad Hoc Tribunals and the ICC will be reviewed: (i) the essence of appellate review (pertaining to the availability of appellate review and associated matters); (ii) the manner in which the appellate process has been regulated; (iii) the bearers of the right to appeal; (iv) the legal representation of the accused on appeal; (v) the composition of the Appeals Chambers; (vi) access to the Appeals Chambers; (vii) the oral and written nature of the appellate proceedings; (viii) the scope of appellate review; (ix) the powers of the Appeals Chambers; and (x) the pronouncement of an appellate judgment.[103]

3. Overview

This study is structured as follows. Part one, which assesses the major domestic approaches to appellate review in second instance, and part two, which concerns the state of international human rights law regarding the right to appeal and associated fair trial guarantees, are devoted to the identification of fair trials norms that bind the Ad Hoc Tribunals and the ICC in respect of their appellate proceedings. Part three describes the law and practice pertaining to the

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[98] Art. 24 ICTR Statute; Art. 25 ICTY Statute; Arts. 81, 83 ICC Statute. However, more general provisions appearing in these documents also bear on the appellate processes of the Ad Hoc Tribunals and the ICC. See: Part III.

[99] Rules 107-119 ICTR RPE; Rules 107-118 ICTY RPE; Rules 149-152 ICC RPE. Furthermore, all RPE provide that the RPE applicable to the Pre-Trial or Trial Chambers may find application on appeal too. See: Rules 107 ICTR and ICTY RPE; Rule 149 ICC RPE.

[100] Regulations 57-65 ICC Regulations of the Court. In addition, certain Regulations applicable to all stages of the legal process may bear on appellate proceedings too. See: Part III.

[101] ICTR, Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007; ICTR, Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006; ICTR, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 8 December 2006; ICTY, Practice Direction on Formal Requirements for Appeals from Judgement, No. IT/201, 7 March 2002; ICTY, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, No. IT/155 Rev. 4, 4 April 2012.

[102] Rules 19(B) ICTR and ICTY RPE.

[103] Issues of detention in connection with appellate proceedings, which are more closely associated with other aspects of the right to a fair trial, have been excluded from the scope of this study. See: Rules 99(b), 102 ICTY and ICTR RPE; Art. 81(3)-(4) ICC Statute.

appellate processes conducted by the Ad Hoc Tribunals and ICC and, on the basis of the benchmarks developed in part one and/or part two, examines whether particular components comply with or fall short of the relevant standards. The conclusion will answer the research question upon which this study is focused and, where necessary, explain the reasons for any shortcomings in the appellate procedures of the Ad Hoc Tribunals and/or the ICC and propose adjustments to the existing legal structures as possible remedies for such shortcomings.

PART ONE

Chapter one commences with a description of the general traits of Civil Law, Common Law, and mixed systems, including the general role ascribed to appellate review in the legal process. Thereafter, the second, third, and fourth chapters continue with an account of the primary aspects of the appellate machineries of the selected domestic systems. The major similarities and dissimilarities between these systems will be evaluated in the fifth chapter. Finally, the interim conclusion will set forth the legal ramifications of this comparative analysis for the appellate systems of the Ad Hoc Tribunals and the ICC.

1. Legal Families

Civil Law[104] and Common Law[105] are the world's most prominent legal families.[106] In addition, mixed systems, which have been traditionally restricted to systems that straddle the boundary between the Civil Law and Common Law families, have become common.[107]

1.1. General Features

Civil Law and Common Law are classically distinguished on the basis of the sources of law emphasised in these legal families.[108] The latter is mainly based on judge-made law. "During the formative period of English legal history", where the Common Law family originated, "there was no strong central legislative body, but […] the powerful king's courts" developed

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[104] This family is also referred to as "Continental, Romano-Germanic, or Roman Law because its origins are in the old Roman Code of Justinian and the laws of Germanic tribes". See: e.g., H. Dammer and E. Fairchild, *Comparative Criminal Justice Systems* (Belmont: Thompson Wadsworth, 2006), at 51. However, for the sake of consistency, the term "Civil Law" will be employed exclusively.

[105] This family is also referred to as the "Anglo-American" model. See: e.g., A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1439 (Oxford: Oxford University Press, 2002), at 1440. However, for the sake of consistency, the term "Common Law" will be employed exclusively.

[106] J. Pradel, *Droit Pénal Comparé* (Paris: Dalloz, 1995), at 47, who notes that the Civil Law systems, Common Law systems and Socialist systems constitute the "major families" of law. However, socialist systems have become nearly obsolete, considering the reforms undertaken in former Socialist countries and China. See: e.g., H. Dammer and E. Fairchild, *Comparative Criminal Justice Systems* (Belmont: Thompson Wadsworth, 2006), at 51.

[107] V. Palmer, 'Mixed Legal Systems', in M. Bussani and U. Mattei (eds.), "The Cambridge Companion to Comparative Law" 368 (Cambridge: Cambridge University Press, 2012), at 374-377. For wider takes on mixed jurisdictions, see: V. Palmer, *Mixed Jurisdictions. The Third Legal Family* (New York: Cambridge University Press, 2012); N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 17.

[108] J. Pradel, *Droit Pénal Comparé* (Paris: Dalloz, 1995), at 47. Also: J. Dainow, 'The Civil Law and the Common Law: Some Points of Comparison', 15(3) *American Journal of Comparative Law* 419 (1966-1967), at 423.

the law.[109] A decision of a court "was not only the law for those parties, but had to be followed in future cases of the same sort, thereby becoming a part of the general or common law".[110] The stability and continuity of this system was dependent on "the doctrine of 'precedent'", i.e. "[o]nce a point had been decided, the same result had to be reached for the same problem".[111] Conversely, in the latter, "the main source or basis of the law is legislation, and large areas are codified in a systematic manner".[112] Such codes are not lists "of special rules for particular situations", but "a body of general principles […]".[113]

The nature of legal proceedings further distinguishes these legal families. Common Law proceedings have been labelled "adversarial".[114] In general, such proceedings are party-driven. The procedural aim of this model "is to settle the conflict stemming from the allegation of commission of crime" and the proceedings amount to "a contest".[115] Accordingly, "the prosecutor's role is to obtain a conviction; the defendant's role is to block this effort".[116] In line with these general roles, the parties bear significant responsibilities. The former "determines which factual propositions he will attempt to prove", marshals "evidence in support of his factual contentions", carries "the burden of persuasion" with respect to the evidence, and bears "the burden of presenting evidence in court".[117] The latter "decides which facts favorable to his theses he will attempt to prove" and adduces "evidence in support of all his factual contentions".[118] The parties' extensive roles necessarily limit the adjudicator's responsibilities. He or she is, therefore, "an umpire who sees to it that the parties abide by the rules regulating their contest".[119] However, in light of the adjudicator's passive attitude,

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[109] J. Dainow, 'The Civil Law and the Common Law: Some Points of Comparison', 15(3) *American Journal of Comparative Law* 419 (1966-1967), at 424.
[110] Ibid., at 424-425.
[111] Ibid., at 425.
[112] Ibid., at 424.
[113] Ibid.
[114] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* 506 (1972-1973), at 562. Furthermore, the Civil Law and Common Law families have also been termed "inquisitorial" and "accusatorial", respectively. However, this distinction has been assigned a wide variety of meanings with different degrees of accuracy (see: e.g., J. Spencer, 'Introduction', in M. Delmas-Marty and J. Spencer (eds.) *European Criminal Procedures* 1 (Cambridge: Cambridge University Press, 2002), at 7-8, 20-37; M. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 5-6). Therefore, the more narrow distinction between adversarial and non-adversarial proceedings will be employed consistently.
[115] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* 506 (1972-1973), at 563.
[116] Ibid., at 563.
[117] Ibid., at 563.
[118] Ibid., at 564, 565.
[119] Ibid., at 563-564.

intervention is only warranted when requested by the parties.[120] Moreover, the adversarial model's "Lockean liberal values, with distrust of the state and freedom from its restraint," account for other distinctive features, such as "[j]udgment by one's peers, ambushes as a result of lack of discovery, publicity, [and] emphasis on oral testimony".[121] In contradistinction, Civil Law proceedings are considered "non-adversarial". This model generally features judicial proceedings controlled by non-partisan officials. The procedural aim of such proceedings is to establish, by means of "an official and thorough inquiry", whether a crime has been committed and whether criminal sanctions are justified.[122] The "court-controlled pursuit of facts" involves a "'unilateral' and detached" process that dispenses with the need for "'[p]arties' in the sense of independent actors".[123] Furthermore, the non-adversarial model's ideological assumptions, which emphasise "collectivistic values and benevolent paternalism", explain other distinctive features, such as the non-adversarial presentation of evidence and lack of technical rules of evidence.[124]

Moreover, the "linkages between politics and justice",[125] which manifest themselves in respect of "[t]he organization of procedural authority"[126] and "the role of government in society",[127] are also construed differently in the Common Law and Civil Law families. In respect of the "[t]he organization of procedural authority", two ideals have been proposed. The first type is a "classical bureaucracy" ("the *hierarchical* ideal"),[128] which Civil Law systems find "much more congenial".[129] The other type is "defined by a body of nonprofessional decision makers, organized into a single level of authority which makes decisions by applying undifferentiated community standards" ("the *coordinate* ideal"),[130] which is more readily associated with Common Law systems.[131] These features have significant implications for the legal process. "Hierarchical" proceedings "consist of several stages", emphasise "superior review", employ the "file of the case" to integrate the various

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[120] Ibid., at 563-564.
[121] Ibid., at 564, 565.
[122] Ibid., at 564.
[123] Ibid., at 564, 565.
[124] Ibid., at 564, 565.
[125] M. Damaška, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (New Haven: Yale University Press, 1986), at 9.
[126] Ibid., at 9.
[127] Ibid., at 10.
[128] Ibid., at 17 (emphasis in original).
[129] Ibid., at 18.
[130] Ibid., at 17 (emphasis in original).
[131] Ibid., at 24.

stages, proceed in a "piecemeal" style over different sessions, discourage "private procedural enterprise", and are regulated "by an internally consistent network of unbending rules".[132] In the "coordinate" process, a continuous trial is the main procedural event, appellate remedies play a limited role, live testimony is preferred, private parties may have significant procedural responsibilities, and procedural rules may yield to considerations of substantive justice.[133]

Notwithstanding the preceding typology, systems of criminal procedure are not neatly divided according to these lines in practice. The heavy borrowing between domestic systems,[134] combined with (regional) integrative impulses,[135] render all systems of criminal procedure mixed to a certain degree. For instance, as to the sources of law, "as a matter of practice, […] [the] highest courts [of Civil Law jurisdictions] will generally follow their previous decisions".[136] In addition, in the reversed situation, statutory laws have become ubiquitous in Common Law systems.[137] With regard to the adversarial - non-adversarial distinction, adversarial judges are, in practice, not completely passive[138] and non-adversarial systems feature elements typically associated with adversarial systems, such as forms of lay-participation and increased emphasis on oral evidence.[139] Even so, these distinctions retain "heuristic value", since they enable "the grand contours of real-life contrast" to be

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[132] Ibid., at 47-56.
[133] Ibid., at 57-65.
[134] E. Örücü, 'Family Trees for Legal Systems: Towards a Contemporary Approach', in M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* 359 (Oxford: Hart Publishing, 2004), at 363; M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* 506 (1972-1973), at 577.
[135] J. Spencer, 'Introduction', in M. Delmas-Marty and J. Spencer (eds.) *European Criminal Procedures* 1 (Cambridge: Cambridge University Press, 2002), at 37-65.
[136] Aleksovski, at 93. Also: J. Dainow, 'The Civil Law and the Common Law: Some Points of Comparison', 15(3) *American Journal of Comparative Law* 419 (1966-1967), at 426-427.
[137] T. Weigend, 'Criminal Law and Criminal Procedure', in J. Smits (ed.), *Elgar Encyclopaedia of Comparative Law* 214 (Cheltenham: Edward Elgar Publishing, 2006), at 219; H. Dammer and E. Fairchild, *Comparative Criminal Justice Systems* (Belmont: Thompson Wadsworth, 2006), at 57-58; J. Pradel, *Droit Pénal Comparé* (Paris: Dalloz, 1995), at 47; J. Dainow, 'The Civil Law and the Common Law: Some Points of Comparison', 15(3) *American Journal of Comparative Law* 419 (1966-1967), at 425-426.
[138] T. Weigend, 'Criminal Law and Criminal Procedure', in J. Smits (ed.), *Elgar Encyclopaedia of Comparative Law* 214 (Cheltenham: Edward Elgar Publishing, 2006), at 224; M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* 506 (1972-1973), at footnote 189.
[139] T. Weigend, 'Criminal Law and Criminal Procedure', in J. Smits (ed.), *Elgar Encyclopaedia of Comparative Law* 214 (Cheltenham: Edward Elgar Publishing, 2006), at 224-225; J. Spencer, 'Introduction', in M. Delmas-Marty and J. Spencer (eds.) *European Criminal Procedures* 1 (Cambridge: Cambridge University Press, 2002), at 10-13. In addition, for the inclusion of adversarial elements into various Latin American jurisdictions, see: M. Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery', 55(4) *American Journal of Comparative Law* 617 (2007).

described.[140] Moreover, a more specific conception of mixed systems has been proposed. It has been remarked that, "[s]ince the 1980s and 1990s, internationalization of the criminal law has opened up a large new market for comparative criminal law".[141] Thus, in the context of legal reforms rooted in, for instance, efforts to eradicate corruption or the transition from communism to multi-party systems, many criminal procedure systems originally based on Civil Law have enacted Common Law inspired reforms. Therefore, whilst the borrowing between domestic systems mainly concerns the introduction of particular elements of one legal system into another, the internationalization of criminal law has yielded more comprehensively mixed systems of criminal procedure.[142]

1.2. Functions of Appellate Review

The two primary functions assigned to appellate review extend, in principle, to Common Law, Civil Law, and mixed systems alike.[143] Such review concerns, first, "the pursuit of justice in the individual case".[144] Adjudication of guilt or innocence constitutes an extremely intrusive measure and may entail severe consequences for the defendant. It is, therefore, of paramount importance that the possibility of error is reduced as far as possible. Therefore, at its core, appellate review is a "quality-control" mechanism.[145] The second goal of appellate review is two-fold: "consistency of verdicts, meaning that similar cases receive similar treatment, and orderly development of law, meaning that novel questions of law receive uniform answers from a single authoritative body".[146] This aim predominantly generates "systemic" effects.[147]

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[140] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* 506 (1972-1973), at 577 (footnote 190). Also: M. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (New Haven: Yale University Press 1986), at 5-6, 9-10.

[141] T. Weigend, 'Criminal Law and Criminal Procedure', in J. Smits (ed.), *Elgar Encyclopaedia of Comparative Law* 214 (Cheltenham: Edward Elgar Publishing, 2006), at 215.

[142] Hereinafter, this study will exclusively refer to this conception of mixed systems.

[143] The limitations of this research prevent a more wide-ranging discussion of the rationales of appellate review. In this regard, see: e.g., A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 370; P. Marshall, 'A Comparative Analysis of the Right to Appeal', 22(1) *Duke Journal of Comparative & International Law* 1 (2011), at 3-4; M. Shapiro, 'Appeal', 14(3) *Law & Society Review* 629 (1979-1980).

[143] M. Fleming, 'Appellate Review in the International Criminal Tribunals', 37(1) *Texas International Law Journal* 111 (2002), at 114.

[144] Ibid., at 114.

[145] M. Damaška, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (New Haven: Yale University Press (1986), at 49.

[146] M. Fleming, 'Appellate Review in the International Criminal Tribunals', 37(1) *Texas International Law Journal* 111 (2002), at 114. Also: R. Pattenden, 'Criminal Appeals. The Purpose of Criminal Appeals', in M. McConville and G. Wilson (eds.), *The Handbook of the Criminal Justice Process* 487 (Oxford: Oxford University Process, 2002), at 487; P. Marshall, 'A Comparative Analysis of the Right to Appeal', 22(1) *Duke Journal of Comparative & International Law* (2011), at 3-4; A. Ashworth and M. Redmayne, *The Criminal*

However, the "linkages between politics and justice" produce, as alluded to, a difference concerning the role of appellate review in the Common Law and Civil Law families.[148] The coordinate structure of the Common Law family entails that appellate review is of a "relatively weak character".[149] The main reason is that, "[w]hen judicial authority is structured as a single undifferentiated echelon, there are no […] higher officials before whom proceedings continue after the initial judgment has been rendered".[150] The structures of authority of the legal systems in the Civil Law family ensure that the opposite effect is achieved. Thus, in a "vertical ordering of authority", "the reviewing stage is conceived […] as a sequel to original adjudication to be expected in the normal course of events".[151]

2. Civil Law

This chapter will address the appellate structures of the legal systems of France, Germany, and Argentina. It is well-known that the former two constitute the backbone of the Civil Law family.[152] In line with the general orientation of Latin American countries towards the Civil Law tradition,[153] Argentina also falls within this category.[154] However, certain features of the Argentinian situation should be mentioned in this respect. Argentina's 1853 Constitution was modelled after the U.S. Constitution and, thus, contains adversarial elements, such as the right to trial by jury.[155] Moreover, in addition to constitutional reforms in 1994, certain Argentinian

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Process (Oxford: Oxford University Press, 2010), at 370; J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 402.

[147] However, this goal also produces "quality-control" effects, seeing that it ensures that the law is accurately and uniformly applied in specific criminal trials.

[148] As will be discussed *infra*, the mixed systems considered in this research perpetuate a Civil Law style of appellate review and, therefore, for the purposes of this distinction, mixed systems may be equated with Civil Law systems. See: Part I, Chapter 4.

[149] M. Damaška, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (New Haven: Yale University Press 1986), at 57.

[150] Ibid.

[151] Ibid., at 48-49.

[152] H. Dammer and E. Fairchild, *Comparative Criminal Justice Systems* (Belmont: Thompson Wadsworth, 2006), at 58, 77. Also: N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 7-8.

[153] H. Dammer and E. Fairchild, *Comparative Criminal Justice Systems* (Belmont: Thompson Wadsworth, 2006), at 51. Also: N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 7-8.

[154] A. Carrió and A. Garro, 'Argentina', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 3 (Durham: Carolina Academic Press, 2007), at 3; A. Gruber, V. de Palacios, and P.H. van Kempen, *Practical Global Criminal Procedure – United States, Argentina, and the Netherlands* (Durham: Carolina Academic Press, 2012), at 20; Also: N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 7.

[155] A. Gruber, V. de Palacios, and P.H. van Kempen, *Practical Global Criminal Procedure – United States, Argentina, and the Netherlands* (Durham: Carolina Academic Press, 2012), at 20.

provinces have enacted criminal codes infused with adversarial elements.[156] Even so, the "inquisitorial [i.e. Civil Law] process remains the primary model" in Argentina.[157]

2.1. France

Appellate review forms part of an array of mechanisms by means of which judicial decisions may be challenged. Such mechanisms, referred to as *voies de recours,* may be classified in different manners.[158] Whereas *voies de recours ordinaires* allow for full re-examination of questions of fact and law, *voies de recours extraordinaires* are limited to an appraisal of legal or, in certain circumstances, factual accuracy.[159] Among the *voies de recours ordinaires,* a distinction is made between *voies de rétraction,* which ensure retrial before the same instance,[160] and *voies de réformation*, which place a matter before a superior court.[161]

In 2000, the French Code of Criminal Procedure was amended to replace the accused's right to an appeal on questions of law[162] from a judgment of a *Cour d'Assises,* which boasts jurisdiction over the most serious offences (*crimes*),[163] to a full-blown right to appeal from such judgments to another *Cour d'Assises.*[164] The pre-existing limitation was rooted in two considerations.[165] First, extensive review of the charging decision was considered a safeguard against erroneous assessment by the trial court. Pursuant to the principle of *second degré*

[156] Ibid., at 20-21; M. Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery', 55(4) *American Journal of Comparative Law* 617 (2007), at 631.
[157] A. Gruber, V. de Palacios, and P.H. van Kempen, *Practical Global Criminal Procedure – United States, Argentina, and the Netherlands* (Durham: Carolina Academic Press, 2012), at 21. Also: A. Carrió and A. Garro, 'Argentina', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 3 (Durham: Carolina Academic Press, 2007), at 3.
[158] The *voies de recours* may also be differentiated on the basis of their relationship with the principle of finality (*l'autorité de la chose jugée*). Certain *voies de recours* prevent or delay a decision from becoming final and, if or when it has done so, such mechanisms become unavailable. Other *voies de recours* may be employed against decisions that have already become final, although they apply in more exceptional circumstances. This distinction is beyond the scope of this research. See: J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 769; G. Stefani, G. Levasseur, and B. Bouluc, *Procédure Pénal* (Paris: Dalloz, 2008), at 885-886.
[159] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 769; G. Stefani, G. Levasseur, and B. Bouluc, *Procédure Pénal* (Paris: Dalloz, 2008), at 886. In addition, resort to the *voies de recours extraordinaires* may only be had once the *voies de recours ordinaires* have been exhausted.
[160] These mechanisms fall outside the scope of this research, since they mainly concern trials conducted *in absentia* and do not directly involve review by a higher court. See: J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 769; G. Stefani, G. Levasseur, and B. Bouluc, *Procédure Pénal* (Paris: Dalloz, 2008), at 770-775.
[161] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 769; G. Stefani, G. Levasseur, and B. Bouluc, *Procédure Pénal*" (Paris: Dalloz, 2008), at 886.
[162] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 768.
[163] Arts. 111(1), 131(1) Code of Criminal Procedure 2017 (France).
[164] Arts. 380(1), 380(2)(1) Code of Criminal Procedure 2017 (France).
[165] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 768.

d'instruction, a conclusion adopted by a *juge d'instruction*[166] that the facts amount to a *crime* requires confirmation from the *chambre d'instruction* before the matter is referred for trial to the *Cour d'Assises.*[167] Moreover, considering that the *Cour d'Assises* is composed of professional judges and laypersons, the maxim that the jury does not err further prevented appellate review.[168] In this regard, it has been remarked that the *second degré d'instruction* constituted a limited added value and that jury decisions have not proved immune to error.[169]

The amendments adopted in 2000 allowed prosecutorial appeals from convictions only and, thus, expressed the principle that "an acquittal is final".[170] This restriction has been described as "illogical", because, in respect of less serious offences, a prosecutorial appeal against an acquittal was permitted by law.[171] Accordingly, a 2002 amendment extended the appellate powers of prosecutorial authorities to appeals from acquittals too.[172] Such a right to appeal has been designated as "indispensable in practice", since it ensures, *inter alia*, a full re-examination of a case in which only certain accused appeal in a multi-accused trial.[173]

An appellate *Cour d'Assises* is mandated to "re-examine the case" in full.[174] This remedy is, thus, a *voie de recours ordinaire* and a *voie de réformation*.[175] A *Cour d'Assises* sitting as a court of appeal proceeds largely in accordance with the modalities applicable to first instance proceedings.[176] Taking account of the relevant adaptations and differences, the main features of appellate proceedings before a *Cour d'Assises* may be described as follows. Upon transfer to the appropriate detention facilities, the accused is questioned by the president of the *Cour d'Assises* on formal aspects.[177] In comparison with a first instance jury, three additional members are added to the appellate jury and both the accused and the prosecution may challenge an additional juror.[178] Subsequently, the president reads out the facts with which the

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[166] A judicial official charged with the conduct of an impartial investigation into inculpating and exonerating circumstances. See: Art. 81 Code of Criminal Procedure 2017 (France).
[167] Arts. 79, 181, 191, 214 Code of Criminal Procedure 2017 (France).
[168] Arts. 240, 254 Code of Criminal Procedure 2017 (France).
[169] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 768.
[170] Ibid., at 779.
[171] Ibid., at 779.
[172] Ibid., at 779.
[173] Ibid., at 779.
[174] Art. 380(1) Code of Criminal Procedure 2017 (France); R. Frase, 'France', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 201 (Durham: Carolina Academic Press, 2007), at 236.
[175] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 775.
[176] Art. 380(1) Code of Criminal Procedure 2017 (France).
[177] Arts. 269, 272-274 Code of Criminal Procedure 2017 (France).
[178] Arts. 296, 298 Code of Criminal Procedure 2017 (France).

accused is charged and, in addition, describes the essence of the first instance decision, the reasoning, and, where applicable, the sentence.[179] The president also leads the questioning of the accused and the witnesses.[180] Furthermore, the president possesses wide-ranging discretionary prerogatives to establish the truth, such as calling supplementary witnesses or ordering the production of additional pieces of evidence.[181] The parties may submit new evidence on appeal as well.[182] Thereafter, the parties may present closing arguments.[183] A decision adverse to the accused on the merits and the pronouncement of the maximum sentence requires a majority of eight votes, although six votes suffice at the trial level.[184]

Even so, several constraints on the powers of an appellate *Cour d'Assises* may be identified. It may not broaden the matter it is seized of by, for instance, extending the indictment to others that have not been tried at first instance or by convicting the appellant of additional offences.[185] It may, however, requalify the facts established at first instance in legal terms, provided that no additional facts are encompassed by the requalification.[186] Moreover, where the appellant curtails his or her appeal to particular elements of the first instance decision, the appellate assessment may not exceed these limitations.[187] However, appellate jurisprudence has established that an appellant may not restrict his or her appeal to the sentence.[188] Finally, appellate aggravation is disallowed in certain circumstances.[189] Most importantly, where an appeal is only instituted by the accused, no decision to his or her detriment may be adopted.[190]

2.2. Germany

The German Code of Criminal Procedure grants the accused an explicit right "to file the appellate remedies admissible against court decisions".[191] Proceedings involving the most serious offences are amenable to *Revision*.[192] In this regard, except in respect of specific situations, *Revision* from first instance judgments adopted by panels of three professional

[179] Art. 327 Code of Criminal Procedure 2017 (France).
[180] Arts. 328-344 Code of Criminal Procedure 2017 (France).
[181] Art. 310 Code of Criminal Procedure 2017 (France).
[182] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 783.
[183] Art. 346 Code of Criminal Procedure 2017 (France).
[184] Arts. 359, 362 Code of Criminal Procedure 2017 (France).
[185] J. Pradel, *Procédure Pénal* (Paris: Cujas, 2010), at 783.
[186] Ibid., at 783.
[187] Ibid., at 784.
[188] Ibid., at 784.
[189] Ibid., at 784-785.
[190] Art. 380(3), (6) Code of Criminal Procedure 2017 (France).
[191] Section 296 Code of Criminal Procedure 2014 (Germany).
[192] Section 333 Code of Criminal Procedure 2014 (Germany).

judges and two lay judges of the Regional Court (*Große Strafkammer* of the *Landgericht*)[193] or before panels of three or five professional judges of the Higher Regional Court (*Oberlandesgericht)*[194] lies with the Federal Court of Justice (*Bundesgerichtshof*).[195] However, such an appeal is only available when an accused has been prejudiced, which depends on the objective assessment of the possibility of amelioration of his or her position on appeal.[196]

The right of the prosecution "to file the appellate remedies admissible against court decisions" mirrors the right of appeal extended to the accused.[197] However, certain facets of the prosecution's right of appeal operate, or have been restricted, in favour of the accused. In addition to appeals lodged to the detriment of the accused,[198] the prosecution disposes of a distinct legal basis to file an appeal "for the benefit of the accused".[199] In any event, a prosecutorial appeal "shall have the effect that the contested decision may be amended or revoked, also for the accused's benefit".[200] Thus, the appellate court is required to assess the matter comprehensively.[201] Finally, "[t]he violation of legal norms existing solely for the defendant's benefit may not be invoked by the public prosecution office for the purpose of quashing the judgment to the defendant's detriment".[202]

Detailed form requirements and time limits apply to the remedy of *Revision*. A notice of appeal must be provided, in which a statement "concerning the extent to which […] [the appellant] contests the judgment and is applying for it to be quashed" must be made.[203] A limitation of the scope of *Revision* is, thus, permitted, although it must concern an aspect of

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[193] Sections 74, 76 Courts Constitution Act 2013 (Germany).
[194] Section 120 Courts Constitution Act 2013 (Germany).
[195] Section 135(1) Courts Constitution Act 2013 (Germany).
[196] J.-P. Graf and P. Allgayer, *Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar* (München: Beck, 2010), at 1233, 1237, 1368-1370.
[197] Section 296 Code of Criminal Procedure 2014 (Germany).
[198] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1236-1237, 1242.
[199] Section 296(2) Code of Criminal Procedure 2014 (Germany).
[200] Ibid., Section 301.
[201] J.-P. Graf and P. Allgayer, *Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar* (München: Beck, 2010), at 1242. However, this obligation is limited by the scope of the prosecutorial appeal. For instance, a request for *Revision* confined to the sentence cannot lead to alterations in respect of the criminal responsibility of the accused. See: ibid., at 1242.
[202] Section 339 Code of Criminal Procedure 2014 (Germany). For instance, where an accused is acquitted notwithstanding a failure to assign counsel, the prosecution may not appeal on the basis of a violation of the right to counsel and seek a conviction to be imposed. See: J.-P. Graf and P. Allgayer, *Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar* (München: Beck, 2010), at 1483.
[203] Section 344 Code of Criminal Procedure 2014 (Germany).

the decision that allows for independent appellate assessment.[204] In addition, the notice of appeal must specify the grounds of appeal and, in this regard, it must be indicated "whether the judgment is being contested because of violation of a legal norm concerning the proceedings or because of violation of another legal norm".[205] Whereas no formal requirements attach to the latter category, the former requires a description of "the facts containing the defect".[206] These facts must be set forth in such a manner to allow the *Bundesgerichtshof* to adjudicate the appeal exclusively on the basis of the notice of appeal.[207] Errors need not be prejudicial,[208] but the majority of requests are dismissed on this basis.[209]

However, compliance with the aforementioned requirements does not guarantee a fully-fledged appellate procedure. The *Bundesgerichtshof* may dispense with a main hearing and decide requests for *Revision* summarily. In practice, *Revision* proceedings rarely proceed beyond this stage.[210] The Code of Criminal Procedure provides three bases for an abridged appellate examination. Firstly, a complaint may be found inadmissible if "the provisions on filing an appeal on law or on submission of the notices of appeal on law have not been complied with".[211] Such an assessment encompasses all grounds of inadmissibility recognised in law and not only the aforementioned requirements as to form.[212] Secondly, upon a reasoned application by the prosecutor, and a response submitted by the appellant,[213] a request for *Revision* may be dismissed as "manifestly ill-founded".[214] This is so when it appears to any expert without prolonged assessment that the impugned judgment is not erroneous in terms of substantive law and that the grounds of appeal do not sustain the complaint.[215] Such a rejection must be adopted unanimously but need not be reasoned.[216] Finally, a shortened

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[204] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1497, 1501.
[205] Section 344 Code of Criminal Procedure 2014 (Germany).
[206] Ibid., Section 344(2).
[207] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1507.
[208] Section 352(2) Code of Criminal Procedure 2014 (Germany).
[209] J.-P. Graf and P. Allgayer, "Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar" (München: Beck, 2010), at 1498.
[210] Ibid., at 1541-1542.
[211] Section 349(1) Code of Criminal Procedure 2014 (Germany).
[212] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1540-1541.
[213] Section 349(3) Code of Criminal Procedure 2014 (Germany).
[214] Ibid., Section 349(2).
[215] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1543.
[216] Ibid., at 1546-1547.

procedure may also operate in favour of the accused, since a judgment may be set aside if it is determined that the appeal "filed for the defendant's benefit […] [is] well-founded".[217]

In any other situation, the *Bundesgerichtshof* "shall decide on the appellate remedy in a judgment".[218] To this end, an appellate hearing is conducted.[219] This hearing commences "with submissions by a rapporteur",[220] in which the contents of the impugned judgment and, depending on the specific grounds of appeal, related matters are presented.[221] Subsequently, "the arguments and applications of the public prosecution office as well as of the defendant and his defence counsel shall be heard".[222] Since *Revision* is primarily decided on the basis of written submissions, the hearing enables a synoptic exchange of arguments.[223] In addition, the appellate hearing does not accommodate the presentation of evidence.[224]

The scope of review in *Revision* proceedings is limited in two principal manners. First, a *proprio motu* examination by the *Bundesgerichtshof* is precluded as the appellate parameters are defined by the notice of appeal.[225] Second, *Revision* is confined to review of legal issues.[226] In this regard, the German Code of Criminal Procedure sets forth that "[o]nly the notices of appeal on law and, insofar as the appeal on law is based on defects in the proceedings, only the facts specified when the notices of appeal on law were submitted, shall be subject to review by the court hearing the appeal".[227] A "violation of the law" has been defined as "[f]ailure to apply a legal norm or erroneous application of a legal norm".[228] Violations of procedural law arise when a required procedural act is not undertaken or when it

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[217] Section 349(4) Code of Criminal Procedure 2014 (Germany). Although the wording suggests that such a decision may only be adopted following an appeal instituted by the accused, this provision has been interpreted to cover any type of appeal considered by the *Bundesgerichtshof.* See: J.-P. Graf and P. Allgayer, *Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar* (München: Beck, 2010), at 1548.
[218] Section 349(5) Code of Criminal Procedure 2014 (Germany).
[219] Ibid., Section 350.
[220] Ibid., Section 351(1).
[221] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1557-1558.
[222] Section 351(2) Code of Criminal Procedure 2014 (Germany).
[223] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1557.
[224] Ibid., at 1559.
[225] Ibid., at 1561.
[226] Section 333 Code of Criminal Procedure 2014 (Germany).
[227] Ibid., Section 352.
[228] Ibid., Section 337(2).

is executed incorrectly.[229] In addition, with regard to alleged violations of substantive law, the *Bundesgerichtshof* principally examines whether: (i) the conclusions of the first instance court constitute a sound basis for the application of substantive law; (ii) the evidentiary evaluation was fraught with error because the first instance judge misunderstood the relevant legal standard or because it was either unclear, incomplete, contradictory or contrary to logic or experience; (iii) the law was correctly applied to the findings; (iv) sentencing was beset with error or the sentence exceeds or falls short of the degree of guilt to such an extent that it cannot be considered to fall within the trial judge's discretion; and (v) the allegations have been exhaustively determined when a *Revision* has been filed against the accused.[230] Moreover, whether or not a judgment is based on a violation of law has been liberally construed, considering that the possibility thereof has been considered sufficient to overturn a judgment.[231] However, certain errors are always considered to be based on a violation of law, since they are seen as exceptionally grave or because a concrete effect on the judgment cannot be verified.[232] Even though the factual basis established at first instance may not be directly reviewed on *Revision,*[233] it has been remarked that appellate courts increasingly "second-guess trial courts' fact finding".[234] For instance, challenges to the substantive correctness of judgments have been granted on the basis of violations of the procedural obligation to "extend the taking of evidence to all facts and means of proof relevant to the decision"[235] and the

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[229] J.-P. Graf and P. Allgayer, "Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar" (München: Beck, 2010), at 1395.
[230] Ibid., at 1408, 1412-1413, 1422, 1424, 1432.
[231] T. Weigend, 'Germany', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 243 (Durham: Carolina Academic Press, 2007), at 269; J.-P. Graf and P. Allgayer, *Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar* (München: Beck, 2010), at 1432-1437.
[232] J.-P. Graf and P. Allgayer, *Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar* (München: Beck, 2010), at 1439. As defined in Section 338 of the Code of Criminal Procedure 2014 (Germany), such is the case "1. if the adjudicating court was not composed in the prescribed form […]; 2. if a professional judge or a lay judge barred by operation of law from exercising judicial office, participated in drafting the judgment; 3. if a professional judge or a lay judge participated in drafting the judgment after he was challenged for bias and the motion for challenge was either declared to be well-founded or erroneously rejected; 4. if the court erroneously assumed jurisdiction; 5. if the main hearing was held in the absence of the public prosecutor or of a person whose presence is required by law; 6. if the judgment was given on the basis of an oral hearing and the provisions concerning the public nature of the proceedings were violated; 7. if the judgment contains no reasons for the decision or the reasons have not been placed on the file within the time limit […]; [or] 8. if the defence was inadmissibly restricted by an order of the court on a question important for the decision".
[233] Section 337(1) Code of Criminal Procedure 2014 (Germany).
[234] T. Weigend, 'Germany', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 243 (Durham: Carolina Academic Press, 2007), at 269-270.
[235] Section 244(2) Code of Criminal Procedure 2014 (Germany).

aforementioned obligation to ensure the completeness and the logical consistency of the evidentiary evaluation by disregarding obvious, alternative interpretations of the evidence.[236]

In the event that a judgment is quashed on *Revision,* it must be remitted to a lower court in most situations.[237] However, in certain circumstances, the *Bundesgerichtshof* may dispose of the matter itself. This mainly occurs "[w]here the judgment is quashed solely because of a violation of the law occurring on its application to the findings on which the judgment was based, […] [and], without further discussion of the facts, the judgment is to take the form of an acquittal or termination of proceedings or imposition of a mandatory penalty, or if, in accordance with the public prosecution office's application, the court hearing the appeal on law deems the statutory minimum penalty or dispensing with punishment to be reasonable". [238] Although the scope of this provision seems to have been specifically circumscribed to the situations enumerated therein, it has been applied in other circumstances as well, provided that the factual findings do not require alteration or completion or that no evaluations or assessments reserved for the trial judge are undertaken.[239] These powers may be employed to the accused's detriment as well,[240] as long as the *Bundesgerichtshof* verifies whether the altered basis for conviction was included in the accusation, the accused was informed thereof, and a different and more fruitful defence could have been presented.[241] However, where an appeal is filed only by the accused, or if the prosecution files an appeal in favour of the accused, the judgment may not be amended to his or her detriment.[242] A decision adopted on remittal remains susceptible to a second *Revision*.[243]

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[236] T. Weigend, 'Germany', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 243 (Durham: Carolina Academic Press, 2007), at 270. Also: J.-P. Graf and P. Allgayer, *Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar* (München: Beck, 2010), at 1386, 1397, 1412.
[237] Section 354(2)-(3) Code of Criminal Procedure 2014 (Germany).
[238] Ibid., Section 354(1). Also: ibid., Section 354(1)(a)-(b).
[239] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1585.
[240] Ibid., at 1586-1587.
[241] Section 265 Code of Criminal Procedure 2014 (Germany).
[242] Ibid., Sections 331, 358(2).
[243] J.-P. Graf and P. Allgayer, Strafprozessordnung, mit Gerichtsverfassungsgesetz und Nebengesetzen: Kommentar (München: Beck, 2010), at 1623.

2.3. Argentina

The Argentinian National Code of Criminal Procedure differentiates between *casación* and *inconstitucionalidad*.[244] Moreover, the Argentinian Supreme Court (*Corte Suprema de Justicia de la Nación*) has recognised the right to appeal as a constitutional principle.[245]

The accused's right of *casación* before the *Cámara Nacional de Casación* is explicitly recognised in the Argentinian National Code of Criminal Procedure.[246] The accused is, moreover, entitled to institute *casación* against a judgment of dismissal or acquittal, as long as a security measure has been imposed.[247] Furthermore, allegations of *inconstitucionalidad* may also be raised in the context of *casación* proceedings.[248]

Considering that the appellate phase is considered an integral component of the trial, the prosecution has been afforded broad rights of appeal.[249] The Supreme Court has found, in this regard, that the extension of appellate rights of the prosecution is not contrary to either due process or double jeopardy.[250] More specifically, the prosecution may appeal from an acquittal where a sentence of imprisonment in excess of three years has been requested[251] and from a conviction where the imposed sentence was less than half the requested sentence[252]. However, on the basis of such appeals, the *Cámara Nacional de Casación* may also modify or revoke the judgment to the benefit of the accused.[253] In addition to this possibility, the prosecution is separately empowered to appeal in favour of the accused.[254]

Requests for *casación* and *inconstitucionalidad* must first be filed with the court that issued the impugned decision and must exhaustively set out each ground of appeal.[255] Where a

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[244] Arts. 457, 474 National Code of Criminal Procedure 2014 (Argentina).
[245] Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 160.
[246] Arts. 23, 459 National Code of Criminal Procedure 2014 (Argentina).
[247] Ibid., Art. 434.
[248] Ibid., Arts. 457, 474-475.
[249] A. Carrió and A. Garro, 'Argentina', in C. Bradley (ed.), 3 *Criminal Procedure – A Worldwide Study* (Durham: Carolina Academic Press, 2007), at 51-52.
[250] Ibid., at 52.
[251] Art. 458 National Code of Criminal Procedure 2014 (Argentina). In addition, an acquittal may also be appealed by the prosecution if a fine of a certain pecuniary value or disqualification for five years or more had been requested.
[252] Ibid., Art. 458. In addition, the other decisions mentioned in Art. 457 of the National Code of Criminal Procedure 2014 (Argentina) may be appealed by the prosecution.
[253] Ibid., Art. 445.
[254] Ibid., Art. 433.
[255] Ibid., Arts. 463, 475. Although other grounds of appeal may not be raised subsequently, the instituted grounds of appeal may be specified after filing. See: ibid., Art. 466.

request for *casación* and *inconstitucionalidad* is denied, a complaint (*queja*) may be directed to the *Cámara Nacional de Casación,* which may either discard the request definitively or determine that it was wrongly denied and hear the appeal.[256] Where an appeal is admitted, an oral hearing is conducted, which may be supplemented by brief written arguments.[257] Additional evidence may be admitted on appeal if it can be characterised as "new".[258]

The scope of the examination of the *Cámara Nacional de Casación* is limited in two principal manners. It may, first, only consider those aspects of the judgment to which the grounds of appeal refer.[259] Second, and more importantly, the scope of review is restrained. *Casación* is confined to questions of law, which may be based, on the one hand, on an alleged failure to apply or a misapplication of substantive law and, on the other hand, on an alleged failure to apply the norms contained in the National Code of Criminal Procedure.[260] In this regard, it is noteworthy that the 1993 amendments to the National Code of Criminal Procedure have replaced *de novo* review with review of questions of law.[261] Even so, the *Corte Suprema de Justicia de la Nación* has expanded the scope of *casación* review. The highest Argentinian court has noted that, whilst a narrow interpretation of *casación* as limited to questions of law is "solely the product of […] legislative tradition and history", the text "lends itself to both [a] narrow and [a] broad or liberal interpretation".[262] In addition, it has held that Article 8(2)(h) ACHR and Article 14(5) ICCPR "should be interpreted as requiring review of any issue not exclusively reserved for those judges on the bench for the oral proceedings", which is a limitation that arises out of "the principle of publicity" and the fact that "cassation judges do not have firsthand knowledge of the oral proceedings".[263] Accordingly, in light of the impossibility of differentiating between questions of law and fact in practice, it has concluded that *casación* "should be understood as enabling a full review of the judgment, one that is as extensive as possible, requiring that cassation judges put out [*sic*] the maximum review effort, according to the possibilities and records of each case and without making too much of those

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[256] Ibid., Arts. 476, 478.
[257] Ibid., Art. 468.
[258] Information provided by A. Carrió in email exchange.
[259] Art. 445 National Code of Criminal Procedure 2014 (Argentina).
[260] Ibid., Arts. 456, 458, 459; A. Carrió and A. Garro, 'Argentina', in C. Bradley (ed.), 3 *Criminal Procedure – A Worldwide Study* (Durham: Carolina Academic Press, 2007), at 51.
[261] A. Carrió and A. Garro, 'Argentina', in C. Bradley (ed.), 3 *Criminal Procedure – A Worldwide Study* (Durham: Carolina Academic Press, 2007), at 53-54.
[262] Reproduced in: Report, *Mendoza et al. v. Argentina*, Report No. 172/10, IACmHR, 2 November 2010, at footnote 156.
[263] Ibid., footnote 155.

issues that are reserved for the judges who were present for the oral proceedings".[264] In addition, with regard to the remedy of *inconstitucionalidad,* it is, still more narrowly, concerned with constitutional matters and must be grounded in the alleged unconstitutionality of a statute, ordinance, decree, or regulation.[265]

The powers of the *Cámara Nacional de Casación* are extensive. In respect of *casación,* where a failure to apply the substantive law or an erroneous application thereof has been found, it may, most notably, quash the impugned judgment and render a decision itself.[266] In addition, if a breach of procedural rules has been established, it may annul the proceedings and remit the matter to the corresponding court.[267] Legal errors that do not affect the judgment, as well as material errors concerning the designation or calculation of sentences, do not lead to annulment, but to correction.[268] With regard to *inconstitucionalidad,* the *Cámara Nacional de Casación* is equally broadly empowered to repeal the contested ruling.[269] The most relevant limitation of its powers is that, on an appeal instituted by the accused or by the prosecution in favour of the accused, the judgment may not be altered to the detriment of the latter.[270]

3. Common Law

The appellate systems of England & Wales, the U.S., and South Africa will be discussed in this section. England & Wales, as the birthplace of the Common Law system,[271] and the U.S., as a former colony in which the Common Law tradition has strongly taken root,[272] are archetypical representatives of the Common Law family. However, the classification of South Africa as a Common Law jurisdiction is not as obvious. Its legal system has been described as "'mixed' on the basis that it has been influenced substantially by Roman-Dutch civil law and English common law".[273] Nevertheless, in respect of criminal procedure, its Common Law

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[264] Ibid., at footnote 155. However, see: Part II, Chapter 4.3.4.2.
[265] Art. 474 National Code of Criminal Procedure 2014 (Argentina).
[266] Ibid., Art. 470.
[267] Ibid., Art. 471.
[268] Ibid., Art. 472.
[269] Ibid., Art. 475.
[270] Ibid., Art. 445.
[271] H. Dammer and E. Fairchild, *Comparative Criminal Justice Systems* (Belmont: Thompson Wadsworth, 2006), at 55-56, 72. Also: N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 10.
[272] H. Dammer and E. Fairchild, *Comparative Criminal Justice Systems* (Belmont: Thompson Wadsworth, 2006), at 58, 77. Also: N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 10.
[273] J. du Plessis, 'South Africa', in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law* 667 (Cheltenham: Edward Elgar Publishing Limited, 2006), at 667. According to this author, African customary law may arguably

tradition overshadows the Civil Law influence. Following the introduction of a Civil Law inspired system of criminal procedure by Dutch colonisers in the seventeenth century, a set of legal reforms led to "the anglicisation of the law of criminal procedure and evidence […], putting an end to the inquisitorial [i.e. Civil Law] system and replacing it with the accusatorial [i.e. Common Law] English procedure" at the end of the eighteenth and the beginning of the nineteenth century.[274] These reforms have established "the foundation of" its modern criminal procedure, thus ensuring a Common Law orientation.[275]

3.1. England & Wales

In England & Wales, the right to appeal was introduced relatively late. Following opposition in legal and political circles in the nineteenth century, the Court of Criminal Appeal, the predecessor of the current Court of Appeal (Criminal Division) ("CACD"), was established in 1907 as a response to notorious miscarriages of justice.[276] Nowadays, a defendant convicted by the Crown Court, which has jurisdiction over serious offences,[277] is separately entitled to appeal either his conviction[278] or sentence[279] to the CACD.

In comparison with defendants, the prosecution disposes of more limited appellate rights. The most important manifestation of this inequality is the fact that the double jeopardy rule prevents prosecutorial appeals against acquittals pronounced by a jury.[280] Commentators have, however, questioned the propriety of such a limitation.[281] In addition, the prosecution's appellate rights have been noticeably expanded over the years. Three relatively limited legal reforms were enacted from 1972 to 1996. First, the attorney-general has been given the power to seek the opinion of the CACD on a point of law in relation to an acquittal.[282] Such a

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also form part of South Africa's legal system. Also: N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 11.

[274] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 23-24.

[275] Ibid., at 22, 24. Of course, non-adversarial elements are still distinguishable in the South African system. See: ibid., at 22-23.

[276] R. Pattenden, English Criminal Appeals - 1844-1994: Appeals against Conviction and Sentence in England and Wales (Oxford: Clarendon Press, 1996), at 5-33.

[277] D. Ormerod, *Smith and Hogan's Criminal Law* (Oxford: Oxford University Press, 2011), at 32. Such offences are referred to as "indictable offences".

[278] Section 1 Criminal Appeal Act 1968 (England & Wales).

[279] Ibid., Section 9.

[280] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 397.

[281] D. Ormerod, A. Waterman, and R. Fortson, 'Prosecution Appeals - Too Much of a Good Thing?', 3 *Criminal Law Review* 169 (2010), at 173-174; J. Spencer, 'Does our Present Criminal Appeal System Make Sense?', 8 *Criminal Law Review* 677 (2006), at 686-689.

[282] Section 36(1) Criminal Justice Act 1972 (England & Wales).

referral has limited effects, however, since it cannot "affect the trial in relation to which the reference is made or any acquittal in that trial".[283] Second, the attorney-general has been endowed with the right to refer cases in which sentencing appears unduly lenient to the CACD.[284] Unlike the aforementioned change, the CACD has been empowered to "quash any sentence passed […]" and "[…] pass such sentence as they think appropriate for the case and as the court below had power to pass […]".[285] Finally, the possibility has been created for the prosecution to apply for a retrial for "tainted" acquittals. This concerns the situation "[w]here a person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal".[286] In 2001, reforms went further.[287] Prosecutorial rights to challenge rulings during trials on indictment were introduced. In this regard,[288] "the prosecution have the power to appeal practically any ruling in a trial on indictment in the Crown Court up to the point of the summing up", even though it was originally envisaged that such appeals would only concern "terminatory rulings", i.e. rulings that bring a trial to an end.[289] Most notably, such powers encompass "no case to answer" rulings,[290] which concern acquittals directed by a judge instead of the jury.[291] Considering that these powers may, in effect, lead to an acquittal being overturned, they constitute a significant inroad into the double jeopardy principle. The most important constraints in this regard[292] concern the need for leave to appeal and the agreement of the prosecution that the defendant will be acquitted should leave to appeal be denied or should the appeal be abandoned before it is determined.[293] Furthermore, in respect of certain serious offences,[294] the prosecution has been empowered to apply for the quashing of an acquittal and a re-trial upon the discovery of "new and compelling evidence".[295]

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[283] Ibid., Section 36(7).
[284] Section 36(1)(a)-(b) Criminal Justice Act 1988 (England & Wales).
[285] Ibid., Section 36(1).
[286] Section 54(1)(b) Criminal Procedure and Investigations Act 1996 (England & Wales).
[287] The Law Commission (Law Com No 267), Double Jeopardy and Prosecution Appeals - Report on Two References under Section 3(1)(e) of the Law Commissions Act 1965, 21 January 2001 (England & Wales).
[288] Sections 57-58 Criminal Justice Act 2003. Further expansions are foreseen in Sections 62 to 66 of this Act.
[289] D. Ormerod, A. Waterman, and R. Fortson, 'Prosecution Appeals - Too Much of a Good Thing?', 3 *Criminal Law Review* 169 (2010), at 169.
[290] Section 58(7) Criminal Justice Act 2003 (England & Wales).
[291] R. Pattenden, 'Prosecution Appeals against Judges' Rulings', 12 *Criminal Law Review* 971 (2000), at 976-977.
[292] Further limitations are enumerated in: D. Ormerod, A. Waterman, and R. Fortson, 'Prosecution Appeals - Too Much of a Good Thing?', 3 *Criminal Law Review* 169 (2010), at 185-193.
[293] Sections 57(4), 58(8)-(9) Criminal Justice Act 2003 (England & Wales).
[294] Ibid., Schedule 5, Part 1.
[295] Ibid., Sections 75-76.

The appellate system of England & Wales discourages the exercise of appellate rights.[296] First, both appeals against conviction and sentence require leave to appeal from either the trial judge or the CACD.[297] Such an application is first heard by a single judge and, should it be rejected, a renewed application may be made to the "full court".[298] In deciding whether to grant leave to appeal, the court assesses whether it "feels the need to hear the prosecution on the merits".[299] Unless permission of the CACD is obtained, a defendant does not have a right to be present and the procedure is conducted without oral submissions,[300] although a renewed application following rejection by the single judge proceeds in open court.[301] This filtering function has been widely accepted as necessary to alleviate the legal system,[302] but it has also been described as "perverse" since appeal against convictions for less serious crimes lies of right.[303] Second, the "loss of time rule" additionally dissuades appeals. Usually, in case of the denial of an appeal, the time spent in custody until such a denial counts towards the sentence. However, judges may rule that this period is not to be subtracted.[304] In such circumstances, a "loss of time" ruling aggravates the sentence. This mechanism has also met with criticism, as it "discourages defendants from pursuing their legal rights".[305] Finally, a guilty plea normally precludes a successful appeal, unless it can be shown that "a mistaken decision by a judge left the accused with no alternative in law but to plead guilty".[306]

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[296] Malleson and Moules argue that the limited possibilities of legal aid on appeal engender further deterrent effects. See: K. Malleson and R. Moules, *The Legal System* (Oxford: Oxford University Press, 2010), at 168. Furthermore, Spencer indicates that sentences are not suspended where the defendant enters an appeal. See: J. Spencer, 'Does our Present Criminal Appeal System Make Sense?', 8 *Criminal Law Review* 677 (2006), at 685-686. In addition, Roberts and Malleson further refer to "poor quality legal advice and a restrictive approach of the Court of Appeal to its powers". See: S. Roberts and K. Malleson, 'Streamlining and Clarifying the Appellate Process', 4 *Criminal Law Review* 272 (2002), at 280.

[297] Section 1 Criminal Appeal Act 1995 (England & Wales); Sections 10, 31(2)(a), 31(3) Criminal Appeal Act 1968 (England & Wales).

[298] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 375.

[299] P. Richardson and J. Archbold, *Archbold Criminal Pleading, Evidence and Practice* (London: Sweet & Maxwell, 2014), at 7-237.

[300] Section 22(2)(b) Criminal Appeal Act 1968 (England & Wales).

[301] Ibid., Section 31(3).

[302] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 375.

[303] J. Spencer, 'Does our Present Criminal Appeal System Make Sense?', 8 *Criminal Law Review* 677 (2006), at 684.

[304] Section 29(1) Criminal Appeal Act 1968 (England & Wales); A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 373.

[305] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 374.

[306] Ibid., at 386. The authors indicate that "[t]he caveat – 'normally' – is aimed at cases where a plea was made by mistake or without intention to admit the truth of the charge".

If these hurdles are overcome, argument before the CACD is conducted mainly orally.[307] CACD judges arrive at an appeal hearing informed, considering that they are provided with relevant documents and conceive of the hearing as an opportunity to test their views against those of counsel.[308] CACD appellate proceedings carry over the adversarial features of trial proceedings, since, for example, the defence present arguments to which the prosecution responds.[309] Whereas the CACD is empowered to order the production of "any document, exhibit or other thing connected with the proceedings", the attendance of any witness for examination, and investigations into any matter,[310] it has been reluctant to do so.[311]

Contrary to appeals concerning less serious offences, the CACD does not conduct a trial *de novo* and confines its scrutiny to factual and legal errors.[312] The CACD "freely reviews decisions for errors of law",[313] which mainly concern the formulation, interpretation, or application of the law.[314] However, "the appellant has to contend with a policy of deference towards findings of fact by the judge or jury".[315] Such reticence seems to result mainly from the following circumstances: (i) the trial court directly appreciates the evidence and the CACD only has access to the trial record; (ii) the jury does not provide reasons; (iii) the hesitance to undermine the central role of the jury through appellate intervention; (iv) the emphasis placed on the finality of decisions; and (v) consciousness of the criminal justice system's finite resources.[316] Even so, the CACD retains several bases to intervene in the factual determination of a jury. The CACD has continued the approach of its predecessor, the

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[307] R. Pattenden, English Criminal Appeals - 1844-1994: Appeals against Conviction and Sentence in England and Wales (Oxford: Clarendon Press, 1996), at 120.
[308] Ibid., at 120-121.
[309] Ibid., at 120.
[310] Sections 23(1)(a)-(b), 23A Criminal Appeal Act 1968 (England & Wales); Section 5 Criminal Appeal Act 1995 (England & Wales).
[311] S. Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal', 1(2) *Justice Journal* 86 (2004), at 92.
[312] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 371, 377-378; R. Pattenden, 'Criminal Appeals: the Purpose of Criminal Appeals', in M. McConville and G. Wilson (eds.), *The Handbook of the Criminal Justice Process* 487 (Oxford: Oxford University Press, 2002), at 488, 491.
[313] R. Pattenden, 'The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division', 1 *Criminal Law Review* 15 (2009), at 26.
[314] R. Pattenden, 'Criminal Appeals: the Purpose of Criminal Appeals', in M. McConville and G. Wilson (eds.), *The Handbook of the Criminal Justice Process* 487 (Oxford: Oxford University Press, 2002), at 488.
[315] R. Pattenden, 'The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division', 1 *Criminal Law Review* 15 (2009), at 26.
[316] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 377-378; R. Pattenden, 'The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division', 1 *Criminal Law Review* 15 (2009), at 26-29. Pattenden additionally points to: (i) the autonomy of the fact-finder; (ii) a margin of appreciation required for the inherently unregulated nature of fact-finding; and (iii) the fact that, unlike for an error of law, the CACD probably cannot order a retrial for an error of fact.

Court of Criminal Appeal, in respect of "inconsistent verdicts", which involve "multiple charges or multiple defendants and apparently contradictory outcomes for which the only rational explanation is jury confusion or a wrong approach".[317] Moreover, following the simplification of the statutory criterion for quashing convictions from "unsafe and unsatisfactory" to "unsafe",[318] the "lurking doubt" test was introduced for other appeals concerning factual elements of a jury verdict.[319] This test involves a subjective assessment as to whether there remains a lurking doubt in the minds of the judges that an injustice was done, although such a determination need not be based strictly on the evidence but may be produced by the general feel of the case.[320] However, hitherto, such appeals have been exceptional.[321] In addition, when fresh evidence has become available post-conviction, the CACD has further possibilities to challenge factual aspects of a jury verdict. The CACD "may, if they think it necessary or expedient in the interests of justice […] receive any evidence which was not adduced in the proceedings from which the appeal lies".[322] A question has arisen as to the appropriate standard for assessing fresh evidence – should the CACD assess whether it might have had an impact on the trial jury or should it determine its own view of such evidence?[323] This matter has not been fully settled. Whereas the former test appeared to have been rejected by the CACD, references to the impact of the fresh evidence on the jury still appear.[324]

The CACD exercises broad statutory prerogatives. In addition to allowing or dismissing an appeal, it may substitute a conviction for an alternative offence, "where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence".[325] The CACD may further order a retrial if the interests of justice so require.[326] Nevertheless, its powers remain equivocal to a certain degree. Two such issues may be mentioned. First, in respect of the aforementioned criterion of "unsafe", the CACD has held that "if, for whatever reason, the court concluded that the appellant was wrongly convicted of the offence charged, or was left in doubt as to whether he was rightly convicted of that

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[317] R. Pattenden, 'The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division', 1 *Criminal Law Review* 15 (2009), at 24.
[318] Ibid., at 25; Section 2(1)-(2) Criminal Appeal Act 1995 (England & Wales).
[319] R. Pattenden, 'The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division', 1 *Criminal Law Review* 15 (2009), at 25.
[320] Ibid., at 25.
[321] Ibid., at 25; K. Malleson and R. Moules, *The Legal System* (Oxford: Oxford University Press, 2010), at 169.
[322] Section 4(1)(a) Criminal Appeal Act 1995 (England & Wales).
[323] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 380.
[324] Ibid., at 380-383.
[325] Section 3 Criminal Appeal Act 1968 (England & Wales).
[326] Ibid., Section 7.

offence, […] it must of necessity quash the conviction".[327] Evidently, this definition does not exhaustively set the parameters of the notion of "unsafe". Second, with respect to legal errors, a controversial matter has emerged concerning the appropriate outcome of an appeal establishing a failure of due process at trial in respect of those who are factually guilty. The CACD has found, at one point, that it does not have the power to quash a conviction if it does not believe that the conviction is unsafe, but is dissatisfied about the conduct of the trial in some way.[328] Thereafter, it appears to have departed from this line of reasoning through subsequent findings that, irrespective of guilt or innocence, an abuse of process may result in the quashing of a conviction.[329] In this regard, there is also ambiguity as to the question when unfairness that does not amount to abuse of process may produce such an outcome.[330]

3.2. United States

A right to appeal does not feature in the U.S. Constitution.[331] In 1894, the U.S. Supreme Court has held that "[i]t is wholly within the discretion of the state to allow or not allow […] review" of a conviction.[332] Nevertheless, regarding more serious offences (felonies), most U.S. jurisdictions vest defendants with relatively broad appellate rights as of right, which encompass appeals from felony convictions and resultant sentences, but also separate rights of appeal from the sentence in some jurisdictions.[333]

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[327] P. Richardson and J. Archbold, *Archbold Criminal Pleading, Evidence and Practice* (London: Sweet & Maxwell, 2014), at 7-44.
[328] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 385-386.
[329] Ibid., at 385-386.
[330] Ibid., at 386-389; K. Malleson and R. Moules, *The Legal System* (Oxford: Oxford University Press, 2010), at 170-173; I. Dennis, 'Fair Trials and Safe Conviction', 56 *Current Legal Problems* 211 (2003), at 211-213; S. Roberts and K. Malleson, 'Streamlining and Clarifying the Appellate Process', 4 *Criminal Law Review* 272 (2002), at 275-278; R. Nobles and D. Schiff, 'Due Process and Dirty Harry Dilemmas: Criminal Appeals and the Human Rights Act', 64(6) *Modern Law Review* 911 (2001), at 917-922.
[331] R. Allen, J. Hoffmann, D. Livingston, and W. Stuntz, *Comprehensive Criminal Procedure* (New York: Aspen Publishers, 2005), at 1559; W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1294. For a critique, see: D. Rossman, ''Were There No Appeal': The History of Review in American Criminal Courts', 81(3) *Journal of Criminal Law & Criminology* 518 (1990-1991); M. Arkin, 'Rethinking the Constitutional Right to a Criminal Appeal', 39 *UCLA Law Review* 503 (1991-1992).
[332] W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1294. Even so, particular facets of state appellate systems have been measured against other constitutional guarantees. Most importantly, it has been established that, if a state decides to establish appellate structures, it may not erect obstacles that fall short of the constitutional guarantee of equal protection. See: W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1295.
[333] See: e.g., Rule 32(j)(1)(a)-(b) Federal Rules of Criminal Procedure 2014 (U.S.). Also: W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1284, 1294. However, where the appellate court views a defence appeal against sentence as opening the door to appellate assessment of all aspects of the sentence, it may not only reject the defendant's complaint but also decide to aggravate the sentence.

The appellate rights of U.S. prosecutors are subject to more limitations, however. According to the U.S. Supreme Court, the Fifth Amendment to the U.S. Constitution, which reads, in the relevant part, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb", bars U.S. prosecutors from appealing acquittals pronounced by juries.[334] This interpretation proceeds from the proposition that a second trial upon a prosecutorial appeal places the defendant twice in jeopardy, since an acquittal terminates the initial jeopardy.[335] Directed acquittals entered by judges have been equated to jury acquittals concerning double jeopardy protection, even when such acquittals go against relevant procedures.[336] In addition, a remand to a lower court is precluded where an appellate court overturns a conviction based on the insufficiency of evidence,[337] since it does not matter whether the reviewing court or the trial court deemed the evidence insufficient.[338]

Nonetheless, several exceptions have been carved out or may otherwise be discerned.[339] Firstly, where a defendant moves for dismissal on grounds unrelated to the determination of factual guilt, but on the basis of, e.g., procedural defects, no claim arises under the double jeopardy doctrine.[340] In this regard, the U.S. Supreme Court has held that double jeopardy protection only attaches to "acquittals", which concern rulings that resolve some or all of the factual elements of the offences charged in favour of the defendant.[341] Secondly, the U.S. Supreme Court has found that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial".[342] Strictly construed, this exception only covers the situation in the case in question, which concerned an appeal from a dismissal by a judge on account of excessive pre-trial delay after a jury had entered a conviction. It has, nevertheless, been suggested that acquittals could be covered in

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[334] W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1223-1224.
[335] Ibid., at 1212. The U.S. Supreme Court, thus, rejects the position that a retrial initiated by a prosecutorial appeal forms part of one and the same cause and, therefore, the same jeopardy. For a critique, see: A. Amar, 'Double Jeopardy Law Made Simple', 106(6) *Yale Law Journal* 1807 (1996-1997), at 1842-1845.
[336] W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1224-1225.
[337] This protection does not apply to situations where reversal of the conviction was secured on grounds other than the sufficiency of evidence, such as a trial error. Nevertheless, some types of misconduct by the prosecution may bar retrial. See: ibid., at 1226-1227.
[338] Ibid., at 1227.
[339] The double jeopardy clause also establishes that the government has no inherent appellate rights, except where provided by statute. Nonetheless, all states currently allow prosecutorial appeals from, at least, a limited category of interlocutory and final orders. In many jurisdictions, such provisions "restrict the government's right of appeal further than the limitations on appeal imposed by the final judgment rule and the Double Jeopardy Clause". Ibid., at 1303-1306.
[340] Ibid., at 1222-1223.
[341] Ibid., at 1222-1223.
[342] Ibid., at 1225-1226.

general, as, relying on the aforementioned ruling, the U.S. Supreme Court has subsequently held that, "[w]here the jury returns a verdict of guilt, but the trial court thereafter enters a judgment of acquittal, an appeal is permitted".[343] Thirdly, a clear exception to the double jeopardy rule is reflected in statutory rights afforded to the prosecution to seek a higher sentence on appeal.[344] According to the U.S. Supreme Court, the essential protection of double jeopardy is to prevent a retrial on guilt and a sentence appeal does not amount to a retrial.[345] Finally, fraudulently obtained acquittals could constitute another exception. In a case involving an acquittal pronounced by a bribed judge, an appellate court held that the person concerned was never in jeopardy and, subsequently, the U.S. Supreme Court refused to exercise its discretion to review the impugned ruling.[346]

Even though appellate review usually is granted as of right, appellate courts may refuse to grant appellate review in a number of situations. This may be done where the party concerned has failed to raise and preserve an error at trial.[347] The "raise-or-waive rule" advances, in the main, judicial economy by pre-empting unnecessary reversals and appeals.[348] The most relevant exception to this rule concerns the authority of appellate courts to grant relief on the basis of a plain error that was not preserved,[349] although the errors amenable to such review differ in the various U.S. jurisdictions. The U.S. Supreme Court has defined a four-pronged test, according to which there must be an error, that is plain, that affects "substantial rights", and that "seriously affects the fairness, integrity, or public reputation of judicial proceedings".[350] In addition, appeals will also not be considered where events have rendered the claim moot or where the right to appeal has been waived, implicitly or explicitly, by defendants entering a plea deal or those who are fugitives from justice.[351] However, in certain U.S. jurisdictions, reduced appellate rights from a guilty plea are available too.[352]

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[343] Ibid., at 1225-1226.
[344] Ibid., at 1284.
[345] Ibid., at 1284-1285.
[346] R. Allen, J. Hoffmann, D. Livingston, and W. Stuntz, *Comprehensive Criminal Procedure* (New York: Aspen Publishers, 2005), at 1492-1493. However, certain commentators have suggested that "a defendant could not be re-tried even if she obtained the acquittal by paying bribes to the entire jury panel". See: M. Cammack and N. Garland, *Advanced Criminal Procedure in a Nutshell* (St. Paul: Thomson/West, 2006), at 240.
[347] W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1314.
[348] Ibid.
[349] Ibid., at 1315-1316. See: e.g., Rule 52(b) Federal Rules of Appellate Procedure 2013 (U.S.).
[350] W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1316.
[351] Ibid., at 1314.
[352] R. Allen, J. Hoffmann, D. Livingston, and W. Stuntz, *Comprehensive Criminal Procedure* (New York: Aspen Publishers, 2005), at 1169; W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 17, 1055. See: e.g., Rule 11(e) Federal Rules of Criminal Procedure 2014 (U.S.).

Despite a variety of procedural systems, the appellate procedure set forth in the Federal Rules of Appellate Procedure, which govern appellate practice in federal courts of appeal,[353] most closely approximate the appellate rules of the different U.S. states.[354] An appeal permitted as of right may be taken only by filing a notice of appeal, which specifies the formal elements, such as the party or parties instituting the appeal, the judgment being appealed, and the court to which the appeal is taken.[355] The record on appeal consists mainly of the original papers and exhibits filed in the first instance court and the transcript of proceedings.[356] Submission of additional evidence on appeal is, thus, not permitted.[357] The appellate process is mainly conducted in writing and is made up of the appellant's brief, the appellee's brief, and the appellant's reply brief.[358] Except in certain circumstances,[359] oral argument must be allowed in every case, although it is frequently dispensed with in practice.[360] It has been remarked that, commonly, appellate "judges use the allotted time for incisive questioning of counsel".[361]

In respect of the scope of appellate review, the degree of deference afforded to the trial court is a critical element of U.S. appellate procedure. In general, three categories may be distinguished.[362] Firstly, decisions considered to amount to "abuse of discretion" by the trial court are reviewed by enquiring whether there is a "definite and firm conviction that the […] court committed a clear error of judgement".[363] This standard constitutes the most deferential form of appellate review, mainly because the trial judge is considered to be in a better position to assess the circumstances surrounding such decisions.[364] Examples of decisions subject to "abuse of discretion" review concern the admission or exclusion of evidence, motions for mistrial or a new trial, and sentencing.[365] Secondly, factual findings of trial judges

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[353] Rule 1(a) Federal Rules of Appellate Procedure 2013 (U.S.).
[354] S. Magidson, 'Preparation and Argument of the Criminal Appeal', 62(2) *The Journal of Criminal Law, Criminology and Police Science* 173 (1971), at 173.
[355] Rule 3(a)(1), 3(c) Federal Rules of Appellate Procedure 2013 (U.S.).
[356] Ibid., Rule 10(a).
[357] K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* 591 (2009-2010), at 605.
[358] Rule 28(a)-(c) Federal Rules of Appellate Procedure 2013 (U.S.).
[359] Ibid., Rules 34(a).
[360] E. Gressman, 'Winning on Appeal - the Shalls and Shall Nots of Effective Criminal Advocacy', 1(4) *Criminal Justice* 10 (1986-1987), at 12.
[361] Ibid., at 12.
[362] W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1318.
[363] Ibid., at 1319; A. Sloan, 'Appellate Fruit Salad and Other Concepts: a Short Course in Appellate Process', 35(1) *University of Baltimore Law Review* 43 (2005-2006), at 62-65.
[364] W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1319.
[365] Ibid., at 1319.

are subject to "clearly erroneous" review.[366] The exact ambit of this standard has not been clarified, although it has been found that a factual finding is clearly erroneous when "a court is left with a firm and definite conviction that a mistake has been committed".[367] Decisions as to, for instance, the presence or absence of discriminatory intent or the competency of a defendant are reviewed against this standard.[368] Moreover, in respect of findings of guilt by a jury or judge, the appellate court asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt".[369] The deference afforded to trial courts may mainly be explained by their institutional advantages vis-à-vis appellate courts. Whilst the latter must confine their examination to the written record, the former, whether constituted by a judge or a jury, observe witnesses first-hand and are, thus, considered to be better placed to assess their credibility.[370] However, the deferential attitude of appellate courts has been criticised on the basis that it has contributed to the appellate system's failure to prevent miscarriages of justice.[371] Thirdly, in respect of questions of law, appellate courts do not afford any deference to lower courts and provide *de novo* review.[372] Strict boundaries between these categories are, of course, hard to draw. The delimitations between questions of law and fact are especially elusive and, accordingly, so-called "mixed questions of law and fact", which require the application of legal principles to historical facts, are also reviewed *de novo*.[373] Such questions concern, for example, whether or not there was probable cause to justify a warrantless search or whether or not a defendant has received effective assistance by counsel.[374]

Where an appellate court does not affirm a judgment, it may either reverse the judgment, which entails nullification and prevents retrial, or, as it usually does, reverse and remand for retrial.[375] However, an error revealed by the appellate process need not affect the judgment

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[366] Ibid., at 1319.
[367] Ibid., at 1319.
[368] Ibid., at 1319.
[369] Ibid., at 1319.
[370] C. Oldfather, 'Appellate Courts, Historical Facts, and the Civil-Criminal Distinction', 57(2) *Vanderbilt Law Review* 437 (2004), at 444-449.
[371] K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* (2009-2010), at 601-603; L. Griffin, 'The Correction of Wrongful Convictions: a Comparative Perspective', 16(5) *American University International Law Review* 1241 (2000-2001), at 1271-1272.
[372] W. LaFave, J. Israel, N. King, and O. Kerr*, Criminal Procedure* (St. Paul: West Group, 2009), at 1319.
[373] Ibid., at 1320.
[374] Ibid., at 1319.
[375] C. Bradley, 'United States', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 519 (Durham: Carolina Academic Press, 2007), at 547; R. Waldron, C. Quarles, D. McElreath, M. Waldron, and D. Milstein, *The Criminal Justice System – an Introduction* (Boca Raton: CRC Press, 2010), at 108-109.

appealed from. The "harmless error" doctrine has not been fully elucidated, but, in simplified terms, it demands that any error that does not affect substantial rights must be disregarded.[376]

3.3. South Africa

Until 1879, appeal from decisions in criminal cases tried before South African superior courts was non- existent.[377] Thereafter, appellate rights were somewhat extended, but it was not until 1948 that the Appellate Division, the predecessor of the current Supreme Court of Appeal, began hearing appeals.[378] Presently, South African appellate procedure is mainly regulated by the Constitution, which includes a right "of appeal to […] a higher court",[379] and statutes, the most important of which is the 1977 Criminal Procedure Act.[380] Accordingly, defendants may appeal a criminal conviction and/or a sentence imposed by the High Court, which deals with the most serious offences,[381] to the Supreme Court of Appeal.[382]

The rights of appeal of South African prosecutors are more restricted and they may exercise these rights in two manners. First, questions of law may be "reserved" upon request of the prosecutor for determination by the appellate court.[383] This procedure is available: "(1) where there has been an *acquittal* […], which is a finding whereby the accused is set completely free […]; (2) where a court quashes an indictment […]; (3) where there has been a conviction and the question of law may be to the advantage of the accused […]; [and] (4) where the question

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[376] W. LaFave, J. Israel, N. King, and O. Kerr*, Criminal Procedure* (St. Paul: West Group, 2009), at 1320-1331. See: e.g., Rule 52(a) Federal Rules of Appellate Procedure 2013 (U.S.).
[377] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 395.
[378] South African Law Commission, The Right of the Director of Public Prosecutions to Appeal on Questions of Fact, December 2000 (South Africa), at 2.8-2.11.
[379] Art. 35(3)(o) Constitution 1996 (South Africa). This Article also lays down a right to review, which provides redress for "an irregularity involved in arriving at the conviction". South African jurisprudence has established that an irregularity does not refer "to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined". See: J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 372. In line with the focus on the right to appeal, and considering that review is, in principle, not available for High Court judgments, this mechanism will not be addressed any further.
[380] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 395.
[381] S. Hoctor, *Criminal Law in South Africa* (Alphen aan den Rijn: Kluwer Law International, 2013), at 155, 156.
[382] Art. 168(3) Constitution 1996 (South Africa); Sections 315(1)(a), 316(1)(a) Criminal Procedure Act 51 1977 (South Africa). A separate procedure is foreseen in Section 319(1) of this Act, whereby questions of law may be reserved by the defendant. However, it has been advanced that this avenue is without practical consequence because of the accused's general right to appeal. J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 443.
[383] Section 319(1) Criminal Procedure Act 51 1977 (South Africa). A court may also reserve a question of law on its own motion or, as mentioned previously, upon request by the accused. More specific bases for prosecutorial appeals pursuant to questions of law are laid down in Sections 316(3)(a) and 333 of the same Act.

of law may have a bearing upon the validity of the sentence imposed […]".[384] Second, a prosecutor may appeal "against a sentence imposed upon an accused in a criminal case".[385] A challenge to this provision on constitutional grounds has been rejected, on the basis that a sentence appeal does not amount to a trial *de novo*, the procedure is not unfair, and the accused's right to a fair trial must be interpreted in the context of the rights and interests of the law-abiding persons in society.[386] It follows that a prosecutorial appeal from acquittal on questions of fact is disallowed, in conformity with the double jeopardy principle.[387] However, the South African Law Commission has recommended that such a ban ought to be dispensed with.[388] In the view of the Commission, this right "should be limited to those cases where a miscarriage of justice occurred on the evidence before the court".[389] This proposal was mainly grounded in the public interest to prevent judicial error, the absence of a prohibition on state appeals in human rights instruments, the possibility of such appeals in some Common Law and Civil Law systems, and the consideration that such appeals do not contravene the double jeopardy clause since appellate proceedings are an extension of the original proceedings.[390] Nevertheless, hitherto, no such reforms have been implemented.[391]

Access to the Supreme Court of Appeal is circumscribed for both the defendant and prosecutor, however. First, an appeal against conviction and sentence resulting from a plea agreement is granted only exceptionally.[392] Second, and more importantly, recourse to its appellate jurisdiction does not lie of right, i.e., leave to appeal must be acquired.[393] Such leave may only be granted "where the judge or judges concerned are of the opinion that […] the appeal would have a reasonable prospect of success or […] there is some other compelling

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[384] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 442-443 (emphasis in original).
[385] Section 316B(1) Criminal Procedure Act 51 1977 (South Africa). For a critique concerning the introduction of such powers, see: J. van Rooyen, 'A Perspective on the Criminal Law Amendment Bill', 3(2) *South African Journal of Criminal Justice* 162 (1990), at 168.
[386] L. Jordaan, 'Appeal by the Prosecution and the Right of the Accused to be Protected against Double Jeopardy: a Comparative Perspective', 32(1) *Comparative & International Law Journal of South Africa* 1 (1999), at 12.
[387] Ibid., at 8. See: Art. 35(3)(m) Constitution 1996 (South Africa).
[388] South African Law Commission, The Right of the Director of Public Prosecutions to Appeal on Questions of Fact (South Africa), December 2000, at 1.1, 5.31.
[389] Ibid., at 1.1, 5.27.
[390] Ibid., at 5.2-5.4, 5.11-5.21. For a critique, see: M. Bennun, 'Prosecution Appeals against Acquittals: The Law Commission's Proposals', 15(1) *South African Journal of Criminal Justice* 88 (2002).
[391] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 411, 443; S. Hoctor, *Criminal Law in South Africa* (Alphen aan den Rijn: Kluwer Law International, 2013), at 239.
[392] P. Schwikkard and S. van der Merwe, 'South Africa', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 471 (Durham: Carolina Academic Press, 2007), at 510.
[393] Sections 315(4), 316(1)(a) Criminal Procedure Act 51 1977 (South Africa).

reason why the appeal should be heard, including conflicting judgments on the matter under consideration".[394] Where leave to appeal is refused, "the accused may by petition apply to the President of the Supreme Court of Appeal" to renew the application.[395] The Constitutional Court has confirmed the constitutionality of this procedure, since the requirements of fairness were satisfied and "[i]t cannot be in the interests of justice and fairness to allow unmeritorious and vexatious issues of procedure, law or fact to be placed before" the appellate tribunal.[396]

Proceedings before the Supreme Court of Appeal consist of written submissions and oral argument, although the latter may be set aside.[397] The Supreme Court of Appeal decides on the basis of the record of the proceedings before the High Court, "including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal".[398] However, the appellate record may be expanded. An application for leave to appeal to the High Court "may be accompanied by an application to adduce further evidence", which "must be supported by an affidavit stating that (i) further evidence which would presumably be accepted as true, is available; (ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial".[399] In addition, where further evidence comes to light after leave to appeal has been granted, the Supreme Court of Appeal has the power to "receive further evidence".[400] It may also remit the case "for further hearing, with such instructions as regards the taking of further evidence or otherwise" as it deems necessary.[401] Additional evidence is admitted only exceptionally, although the Supreme Court of Appeal may exercise a degree of flexibility in this regard, provided that it is satisfied that, upon admission of the evidence, there is a reasonable probability that the person concerned would not be convicted in a further hearing.[402]

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[394] Section 17(1)(a) Superior Courts Act 2013 (South Africa).
[395] Section 316(8)(a)(ii) Criminal Procedure Act 51 1977 (South Africa).
[396] Judgment, *S v. Rens*, (CCT1/95) [1995] ZACC 15, South Africa, Constitutional Court, 28 December 1995, at 19-26.
[397] Section 19(a) Superior Courts Act 2013 (South Africa).
[398] Section 316(7)(a) Criminal Procedure Act 51 1977 (South Africa).
[399] Ibid., Section 316(5)(a)-(b).
[400] Section 19(b) Superior Courts Act 2013 (South Africa); J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 447.
[401] Section 19(c) Superior Courts Act 2013 (South Africa).
[402] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 436.

Since the defendant's right to appeal is "concerned with the substantive correctness of the decision based on the facts or merits of the case on the record and the law relevant to such facts",[403] the scope of review of the Supreme Court of Appeal has both a factual and legal component. In relation to an appeal on the facts, it has been remarked that the Supreme Court of Appeal is "usually loath to interfere with the findings of the trial court", which is especially the case if the finding is based on the impressions made by witnesses, as the trial court directly appreciates the evidence.[404] However, in respect of "inferences, other facts and probabilities", the Supreme Court of Appeal is more likely to intervene since it is not in a disadvantageous position compared to the trial court.[405] There is a presumption that "the trial court's evaluation of the evidence as to the facts is correct" and appellate interference is, thus, only justified "if it is convinced that the evaluation is wrong".[406] A different test governs appeals in respect of questions of law. In comparison with a question of fact, the Supreme Court of Appeal does not ask whether "it would have made the same finding but whether the trial court *could* have made such a finding".[407] It is unsurprising that the distinctions between questions of law and fact have proved difficult to delineate.[408] Nevertheless, the meaning afforded to questions of law by the Supreme Court of Appeal has been termed "narrow", so as to prevent prosecutorial appeals on questions of facts to be presented under the guise of questions of law.[409] In this regard, it found that appellate review based on a question of law assesses "whether the proven facts in the particular case constitute the commission of the crime", which is "not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime where there is no doubt or dispute as to what those ingredients are".[410] Finally, considering that the trial court is vested with discretion in respect of sentencing, the Supreme Court of Appeal intervenes only when such discretion has not been exercised judicially.[411] Thus, a sentence may only be subject to appellate adjustment: "(*a)* when the sentence is vitiated by an irregularity […]; (*b*) when the trial court misdirects

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[403] Ibid., at 372.
[404] Ibid., at 409.
[405] Ibid., at 409.
[406] Ibid., at 409-410.
[407] Ibid., at 410 (emphasis in original).
[408] Ibid., at 410-411; South African Law Commission, *The Right of the Director of Public Prosecutions to Appeal on Questions of Fact* (South Africa), December 2000, at 2.24.
[409] L. Jordaan, 'Appeal by the Prosecution and the Right of the Accused to be Protected against Double Jeopardy: a Comparative Perspective', 32(1) *Comparative & International Law Journal of South Africa* (1999), at 11.
[410] South African Law Commission, The Right of the Director of Public Prosecutions to Appeal on Questions of Fact (South Africa), December 2000, at 2.24.
[411] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 407.

itself (e.g., by taking into consideration irrelevant factors) […]; [or] (*c*) when the sentence is so severe that no reasonable court would have imposed it […]".[412]

The Supreme Court of Appeal may adopt a number of decisions. Firstly, with regard to "an appeal against a conviction or of any question of law reserved", it may: "(a) allow the appeal if it thinks that the judgment of the trial court should be set aside […]; or (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or (c) make such other order as justice may require".[413] Thus, for instance, where a reserved question of law is answered in favour of the State, an acquittal may be substituted with a conviction and a sentence may be imposed.[414] Secondly, in relation to sentencing appeals, the Supreme Court of Appeal "may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial".[415] Although it could not do so prior to 1963, the Court now possesses "the power to impose a punishment more severe than that imposed by the court below […]".[416] The Supreme Court of Appeal may even increase the sentence when no appeal against sentence is taken, as long as it provides notice to the appellant that it contemplates an aggravation.[417] Finally, where it sets aside a conviction and sentence on the ground that "the court […] was not competent" to convict the accused, that "the indictment […] was invalid or defective", or that "there has been any other technical irregularity or defect in the procedure", the Supreme Court of Appeal is empowered to institute *de novo* proceedings.[418] In respect of the latter category, the Constitutional Court has clarified that an irregularity or defect is of a technical nature where it prevents an assessment of the merits and that, in such circumstances, the

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[412] Ibid., at 407-408.
[413] Section 322(1) Criminal Procedure Act 51 1977 (South Africa) (Section 19(d) Superior Courts Act 2013 (South Africa) lays down similar prerogatives). The former section includes a proviso, according to which, "notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect". For a discussion of this proviso, see: J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 447-449.
[414] South African Law Commission, The Right of the Director of Public Prosecutions to Appeal on Questions of Fact (South Africa), December 2000, at 2.26.
[415] Section 322(2) Criminal Procedure Act 51 1977 (South Africa).
[416] Ibid., Section 322(6); J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 446.
[417] J. Joubert (ed.), T. Geldenhuys, J. Swanepoel, S. Terblanche, and S. van der Merwe, *Criminal Procedure Handbook* (Claremont: Juta, 2014), at 446.
[418] Section 324 Criminal Procedure Act 51 1977 (South Africa).

double jeopardy doctrine does not bar a retrial.[419] Furthermore, *de novo* proceedings may also be ordered if a prosecutorial appeal against an acquittal is granted.[420]

4. Mixed Systems

The Italian and Russian appellate systems will be considered as examples of Civil Law jurisdictions that have adopted far-reaching Common Law inspired reforms, even though some continue to classify these countries as Civil Law systems.[421]

The 1989 Italian Code of Criminal Procure replaced the 1930 Code of Criminal of Criminal Procedure, which had been described as "a relic of the Fascist era".[422] Italy's reforms were, *inter alia,* motivated by "the staggering inefficiency of the former system" and a desire "to 'open up' its criminal justice system, both to reflect its status as a modern democratic society and to make a dramatic break with past reliance on closed pretrial hearings".[423] The reforms of the criminal process along adversarial lines has been labelled "[s]o radical" that they "have no modern precedent".[424] A wealth of commentaries has depicted the trials and tribulations of the introduction of adversarial elements into a predominantly non-adversarial setting.[425] It has been remarked that "[t]he result is a system caught between two traditions".[426]

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[419] S. Jordaan, 'De Novo-Verhore en die Beskuldigde se Reg op 'n Billike Verhoor', 30(2) *Tydskrif vir die Suid-Afrikaanse Reg* 345 (2007), at 346-347.
[420] Section 322(4) Criminal Procedure Act 51 1977 (South Africa).
[421] E.g., N. Mariani and G. Fuentes, *Les Systèmes Juridiques dans le Monde* (Montréal: Wilson & Lafleur, 2000), at 7-8.
[422] L. Lupária, 'Model Code or Broken Dream? The Italian Criminal Procedure in a Comparative Perspective', in M. Gialuz, L. Lupária, and F. Scarpa (eds.), *The Italian Code of Criminal Procedure. Critical Essays and English Translation* 1 (Lavis: Wolters Kluwer Italia, 2014), at 4; W. Pizzi and L. Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation', 17(1) *Yale Journal of International Law* 1 (1992), at 3. Also: S. Freccero, 'An Introduction to the New Italian Criminal Procedure', 21(3) *American Journal of Criminal Law* 345 (1994); L. Fassler, 'The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe', 29(1) *Columbia Journal of Transnational Law* 245 (1991).
[423] W. Pizzi and L. Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation', 17(1) *Yale Journal of International Law* 1 (1992), at 2-3, 5-6. Also: L. Lupária, 'Model Code or Broken Dream? The Italian Criminal Procedure in a Comparative Perspective', in M. Gialuz, L. Lupária, and F. Scarpa (eds.), *The Italian Code of Criminal Procedure. Critical Essays and English Translation* 1 (Lavis: Wolters Kluwer Italia, 2014), at 6.
[424] W. Pizzi and L. Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation', 17(1) *Yale Journal of International Law* 1 (1992), at 3. Also: L. Lupária, 'Model Code or Broken Dream? The Italian Criminal Procedure in a Comparative Perspective', in M. Gialuz, L. Lupária, and F. Scarpa (eds.), *The Italian Code of Criminal Procedure. Critical Essays and English Translation* 1 (Lavis: Wolters Kluwer Italia, 2014), at 2-5.
[425] E.g., L. Lupária, 'Model Code or Broken Dream? The Italian Criminal Procedure in a Comparative Perspective', in M. Gialuz, L. Lupária, and F. Scarpa (eds.), *The Italian Code of Criminal Procedure. Critical Essays and English Translation* 1 (Lavis: Wolters Kluwer Italia, 2014), at 9-14; J. Ogg, 'Adversary and Adversity: Converging Adversarial and Inquisitorial Systems of Justice – a Case Study of the Italian Criminal Trial Reforms', 37(1) *International Journal of Comparative and Applied Criminal Justice* 31 (2013); J. Ogg,

Post-Soviet Russia has introduced comprehensive reforms too. As part hereof, a new Code of Criminal Procedure was enacted in 2001, in order to remedy, primarily, the lack of independence of pre-trial investigators, the "minimal rights and protections [afforded to the defence] during the pre-trial phase", and the general pro-state bias in criminal proceedings.[427] The 2001 Code of Criminal Procedure breaks with Russia's non-adversarial legal tradition and incorporates adversarial elements into criminal proceedings. As expressed by this Code, in addition to protecting persons who "have suffered from […] crimes", criminal proceedings aim to shield persons from "unlawful and ungrounded accusations and conviction, and […] restriction of […] rights and freedoms".[428] To this end, criminal proceedings "shall be conducted on the basis of the adversarial nature of the parties [*sic*]".[429] However, the degree to which the system has, in reality, abandoned its non-adversarial tradition has been debated.[430] Like the Italian system, the Russian reforms have been described as "incomplete in practice", since the 2001 Code is not "sufficiently concrete and specific in setting out the new

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'Italian Criminal Trials: Lost in Transition? Differing Degrees of Criminal Justice Convergence in Italy and Australia', 36(3) *International Journal of Comparative and Applied Criminal Justice* 229 (2012); M. Panzavolta, 'Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System', 30(3) *North Carolina Journal of International Law and Commercial Regulation* 577 (2005); G. Illuminati, 'The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)', 4(3) *Washington University Global Studies Law Review* 567 (2005); E. Amodio, 'The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy', 52(2) *American Journal of Comparative Law* 489 (2004); W. Pizzi and M. Montagna, 'The Battle to Establish an Adversarial Trial System in Italy', 25(2) *Michigan Journal of International Law* 429 (2004); E. Grande, 'Italian Criminal Justice: Borrowing and Resistance', 48(2) *American Journal of Comparative Law* 227 (2000).

[426] W. Pizzi and L. Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation', 17(1) *Yale Journal of International Law* 1 (1992), at 3.

[427] P. Solomon, 'The Criminal Procedure Code of 2001. Will it Make Russian Justice more Fair?', in W. Pridemore (ed.), *Ruling Russia. Law, Crime and Justice in a Changing Society* 77 (Lanham: Rowman & Littlefield Publishers Inc., 2005), at 79-82.

[428] Art. 6 Code of Criminal Procedure 2013 (Russia).

[429] Ibid., Art. 15(1).

[430] P. Solomon, 'The Criminal Procedure Code of 2001. Will it Make Russian Justice more Fair?', in W. Pridemore (ed.), *Ruling Russia. Law, Crime and Justice in a Changing Society* 77 (Lanham: Rowman & Littlefield Publishers Inc., 2005), at 82-83. For additional analysis of the 2001 Russian Code of Criminal Procedure, see: W. Burnham, P. Maggs, and G. Danilenko, *Law and Legal System of the Russian Federation* (Huntington: Juris Publishing, 2012), at 497-597; W. Burnham and J Kahn, "Russia's Criminal Procedure Code Five Years Out", 33 Review of Central and East European Law 1 (2008); L. Golovko, 'Le Nouveau Code de Procédure Pénale Russe de 2002: Quel Modèle de Procès Pénal pour la Russie?', 38(2) *Revue d'Études Comparatives Est-Ouest* 31 (2007); P. Jordan, 'Criminal Defense Advocacy in Russia under the 2001 Criminal Procedure Code', 53(1) *American Journal of Comparative Law* 157 (2005); S. Chestakova, 'The Type of Criminal Procedure in the Code of Criminal Procedure of the Russian Federation, 2001', in A. Eser and C. Rabenstein (eds.), *Strafjustiz im Spannungsfeld von Effizienz und Fairness* 35 (Freiburg: Max Planck Gesellschaft zur Förderung der Wissenschaften e.V., 2004).

adversarial responsibilities of the participants, combined with a lack of training to develop the skills and traditions necessary to discharge those responsibilities".[431]

However, these reforms have not affected the appellate processes of the Italian and Russian systems of criminal procedure. In respect of Italy, it has been remarked that "[a]ppellate review attracted little discussion during the debates leading up to the reform of criminal procedure" and "[c]ommentators are only now asking whether the new adversarial trial procedures provide sufficient protection from judicial error to make such extensive appeal rights unnecessary".[432] Similarly, as concerns Russia, it has been claimed that "while some parts of the new Code [of Criminal Procedure] set out adversarial features, other parts of the Code work against them",[433] which arguably extends to its style of appellate review.

4.1. Italy

The accused may appeal judgments of conviction pronounced by a court of assizes (*corte di assise*), which is competent for offences punishable by life sentence or by, at least, twenty-four years' imprisonment and certain other serious offences, by means of *appello* before the assize court of appeal (*corte di assise di appello*).[434] This remedy encompasses judgments of dismissal as well, which includes a judgment of non-prosecution, different types of judgments of acquittal, and a declaration concerning the extinguishment of the offence.[435] The prosecutor has been endowed with identical rights of appeal.[436]

Appello may be invoked by means of a written application, which, in addition to certain formal requirements, must indicate: "the sections or subsections of the [impugned] decision to which the appellate remedy refers; […] the requests; [and] […] the arguments, with the

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[431] W. Burnham and J Kahn, 'Russia's Criminal Procedure Code Five Years Out', 33(1) *Review of Central and East European Law* 1 (2008), at 5.
[432] W. Pizzi and L. Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation', 17(1) *Yale Journal of International Law* 1 (1992), at footnote 83. Also: M. Gialuz, 'The Italian Code of Criminal Procedure: a Reading Guide', in M. Gialuz, L. Lupária, and F. Scarpa (eds.), *The Italian Code of Criminal Procedure. Critical Essays and English Translation* 17 (Lavis: Wolters Kluwer Italia, 2014), at 47-48; S. Freccero, 'An Introduction to the New Italian Criminal Procedure', 21(3) *American Journal of Criminal Law* 345 (1994), at 380.
[433] W. Burnham and J Kahn, 'Russia's Criminal Procedure Code Five Years Out', 33(1) *Review of Central and East European Law* 1 (2008), at 5.
[434] Arts. 593(1), 596(2) Code of Criminal Procedure 1988 (Italy).
[435] Ibid., Arts. 529-531, 593(2). Pursuant to Art. 597(2)(b) Code of Criminal Procedure 1988 (Italy), the *corte di assise di appello* enjoys a corresponding prerogative to "dismiss the accused for a reason other than that referred to in the appealed judgment". Also: R. Van Cleave, 'Italy', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 303 (Durham: Carolina Academic Press, 2007), at 348.
[436] Arts. 570, 593 Code of Criminal Procedure 1988 (Italy).

specification of the *de jure* and *de facto* reasons sustaining each request".[437] Failure to comply with these requirements leads to inadmissibility.[438]

Since *appello* comprises both questions of fact and law, the proceedings before the *corte di assise di appello* have been termed "a trial proceeding of second instance (*secondo grado di giudizio*)".[439] These proceedings are conducted in accordance with the rules concerning first instance proceedings, if applicable,[440] supplemented by specific rules. In the event of particular *appello* applications of a limited scope, such as those concerning the type or extent of the sentence, hearings may be held in closed session.[441] In other situations, an "[a]ppeal trial" is conducted.[442] Such a trial commences with an oral report of the case by the president or another judge.[443] During the trial, documents pertaining to preceding phases of the trial may be read out within the applicable limitations.[444] Subsequently, a "debate" is conducted, which allows the prosecutor and the accused to present their conclusions and to respond to each other's arguments.[445] Furthermore, a first instance evidentiary hearing may be renewed on *appello*.[446] Such a hearing shall be conducted upon a party's request "that evidence already gathered during the first instance trial be taken anew or that new evidence be gathered", provided that the judge considers that "he is unable to decide on the basis of the available elements of evidence".[447] In addition, the evidentiary hearing may also be renewed if new evidence emerges[448] or if it is considered "absolutely necessary" by a judge.[449]

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[437] Ibid., Art. 581.
[438] Ibid., Art. 591(1)(c). The remainder of the first subparagraph of this provision specifies that inadmissibility of an appellate remedy may also result from the following circumstances: lack of entitlement or interest to appeal; impossibility to appeal a particular decision; failure to comply with the requirements laid down in Articles 582, 583, 585 and 586 Code of Criminal Procedure 1988 (Italy); and waiver of an appellate remedy.
[439] R. Van Cleave, 'Italy', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 303 (Durham: Carolina Academic Press, 2007), at 348.
[440] Art. 598 Code of Criminal Procedure 1988 (Italy).
[441] Ibid., Art. 599.
[442] Ibid., Art. 602.
[443] Ibid., Art. 602(1).
[444] Ibid., Art. 602(2). These limitations are contained in Arts. 511-515.
[445] Ibid., Art. 602(3), referring to Art. 523. As detailed in the former provision, other parties may also present conclusions.
[446] Although three bases will be mentioned in this respect, a fourth basis is also provided in Article 603(4) Code of Criminal Procedure 1988 (Italy), pursuant to which an accused who was absent from the first instance proceedings may request the renewal of the first instance evidentiary hearing under certain circumstances. However, this basis will not be discussed further, as it is not directly relevant to the conduct of the *appello* phase.
[447] Art. 603(1) Code of Criminal Procedure 1988 (Italy).
[448] Ibid., Art. 603(2).
[449] Ibid., Art. 603(3).

The *corte di assise di appello* may adopt a wide array of decisions. In general, a judgment confirming or amending the impugned decision shall be adopted.[450] With respect to prosecutorial appeals, more specific possibilities have been laid down. Most notably, in relation to a judgment of conviction, an *appello* judge "may, within the limits of competence of the first instance judge, provide a more serious legal definition for the criminal acts […] [and] change the type or increase the length or amount of penalty".[451] Furthermore, a judgment of dismissal may be converted into a judgment of conviction and it may be aggravated in the same manner as a judgment of conviction.[452] Nevertheless, appellate aggravation of the impugned judgment is disallowed if the accused is the sole appellant, although this limitation does not affect the court's aforementioned powers to assign a more serious legal qualification to the act(s) in question.[453]

4.2. Russia

The right to appeal a criminal conviction is explicitly set forth in the Constitution of the Russian Federation[454] and the 2001 Russian Code of Criminal Procedure.[455] The latter provides elaborate procedural rules concerning the various appellate remedies.

Persons tried by Subject-Level Courts, whether they have been acquitted or convicted, may institute *apelliatsia* before the Criminal Chamber of the Supreme Court ("the Supreme Court").[456] Russian prosecutors enjoy a right to appeal equivalent to the person acquitted or convicted at first instance without additional restrictions.[457] In this regard, it is noteworthy that the 2001 Russian Code of Criminal Procedure was subject to a major overhaul in 2013. Previously, offences for which the sentence did not exceed three years, were subject to *apelliatsia,*[458] whereas more serious offences were only reviewable by means of *kassatsia,* a form of appeal limited to questions of law.[459] The 2013 reforms extended *apelliatsia* to more serious offences too. In this regard, it has been considered that the various appellate

[450] Ibid., Art. 605(1).
[451] Ibid., Art. 597(2)(a).
[452] Ibid., Art. 597(2)(b).
[453] Ibid., Art. 597(3).
[454] Art. 50(3) Constitution 1993 (Russia).
[455] Art. 19(2) Code of Criminal Procedure 2013 (Russia).
[456] Ibid., Art. 389.1(1).
[457] Ibid., Art. 389.1(1).
[458] Ibid., Arts. 31(1), 361; W. Burnham, P. Maggs and G. Danilenko, *Law and Legal System of the Russian Federation* (New York: Juris, 2012), at 80-81.
[459] Arts. 31(2)-(3), 355(3) Code of Criminal Procedure 2013 (Russia); W. Burnham, P. Maggs and G. Danilenko, *Law and Legal System of the Russian Federation* (New York: Juris, 2012), at 81-83.

procedures should be harmonised and that *kassatsia* suffered from certain drawbacks.[460] In addition, European experts urged for the introduction of a "'double-trial' form of appeal".[461]

Seeing that *apelliatsia* involves a verification of the legality, reasonableness and fairness of a judgment,[462] which amounts to a "complete review *de novo* of all facts and law",[463] proceedings before the Supreme Court proceed, in the main, according to the rules applicable to first instance proceedings.[464] More specific elements of such appellate proceedings are regulated separately. Upon the formal opening of the hearing by the presiding judge, the "judicial investigation" commences with a brief presentation of the contents of the impugned judgment or decision, the *apelliatsia,* the counterarguments, and the additional materials by the presiding judge.[465] Following completion of the judicial investigation, the parties provide oral arguments.[466] Thereafter, the Supreme Court proceeds with the examination of the evidence, which may include additional materials filed by the parties and, if deemed necessary, the examination of first instance witnesses.[467] In addition, the parties may file motions for the examination of evidence that was not considered at first instance.[468]

The Supreme Court has been endowed with broad powers, the most important of which concern the following. First, it may expand the remit of the case before it. In this regard, the 2001 Russian Code of Criminal Procedure stipulates that the Supreme Court is not restricted to the grounds of appeal advanced by the parties and that it may review the entire proceedings instead.[469] However, *apelliatsia* proceedings must be limited to the original charges.[470] An

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[460] Explanatory Note to the Draft Federal Law "on Amendments to the Code of Criminal Procedure of the Russian Federation and Declaring Certain Legislative Acts (Provisions of the Legislative Acts) of the Russian Federation Null and Void" (on file with author, provided by O. Schwartz). These drawbacks have been described as the "lack of detailed regulation of the order of examination of new evidence submitted by the parties, as well as [the] impossibility of rendering a new judicial decision fully replacing the judicial decision of the trial court without quashing it and sending the case for new consideration to the trial court […]"
[461] W. Burnham, P. Maggs and G. Danilenko, *Law and Legal System of the Russian Federation* (New York: Juris, 2012), at 595.
[462] Art. 389.9 Code of Criminal Procedure 2013 (Russia).
[463] W. Burnham, P. Maggs and G. Danilenko, *Law and Legal System of the Russian Federation* (New York: Juris, 2012), at 592.
[464] Art. 389.13(1) Code of Criminal Procedure 2013 (Russia), referring to Chapters 35 to 39 of the Code of Criminal Procedure 2013 (Russia), which concern: "General Conditions for the Judicial Proceedings", "Preparatory Part of a Court Session", "Judicial Investigation", "Parties' Presentations and the Last Plea of the Defendant", and "Passing the Sentence".
[465] Art. 389.13(2)-(3) Code of Criminal Procedure 2013 (Russia).
[466] Ibid., Art. 389.13(4).
[467] Ibid., Art. 389.13(4)-(5).
[468] Ibid., Art. 389.13(6).
[469] Ibid., Art. 389.19(1).

exception has been made to allow the prosecution to amend the charges to the benefit of the person concerned, provided that the Supreme Court ensures that the latter has been provided with additional time to prepare a new defence strategy.[471] Second, in line with the extensive scope of review, the Supreme Court has broad powers to reverse or alter a judgment. It may do so in the following circumstances:[472] (i) non-compliance of the conclusions of the court of first instance with the facts;[473] (ii) a major violation of the rules of criminal procedure;[474] (iii) incorrect application of the criminal law;[475] and (iv) imposition of an unfair sentence.[476] However, non-compliance of the conclusions of the first instance court with the facts has been excluded as a ground of reversal for judgments rendered with the participation of a jury.[477] Third, unless a violation committed by the court of first instance may be remedied by the Supreme Court, the matter must be remitted to a different panel of the court of first instance.[478] In case of remittal, the Supreme Court may not pre-determine the following issues: (i) whether or not a charge has been proved; (ii) the reliability or unreliability of a piece of evidence; (iii) the precedence of certain pieces of evidence over others; and (iv) the type of penalty and the extent thereof.[479] Finally, the Russian Code of Criminal Procedure specifies that appellate aggravation of the first instance judgment is permitted. However, the aggravation of a judgment of conviction, or the reversal and transfer for new trial of a judgment of acquittal based on its unlawfulness or unreasonableness, is only allowed upon appeal by the prosecution[480] and, therefore, not applicable to appeals filed solely by the accused. The reference to a "new trial" also entails that a judgment of acquittal may not be

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[470] Ibid., Art. 252(1); Decision, On the Application of Provisions of the Criminal Procedure Code of the Russian Federation Regulating Proceedings in Appeal Instance Court, No. 26, Russia, Plenum of the Supreme Court, 27 November 2012, at 15 (on file with author, provided by O. Schwartz).
[471] Arts. 246(8), 252(2) Code of Criminal Procedure 2013 (Russia); Decision, On the Application of Provisions of the Criminal Procedure Code of the Russian Federation Regulating Proceedings in Appeal Instance Court, No. 26, Russia, Plenum of the Supreme Court, 27 November 2012, at 15 (on file with author, provided by O. Schwartz).
[472] Art. 389.15 Code of Criminal Procedure 2013 (Russia).
[473] Ibid., Art. 389.16, which further specifies this ground.
[474] Ibid., Art. 389.17, which further specifies this ground.
[475] Ibid., Art. 389.18(1), which further specifies this ground.
[476] Ibid., Art. 389.18(2), which further specifies this ground.
[477] Ibid., Art. 389.27. This also applies the procedures set forth in Chapters 40 and 40.1 Code of Criminal Procedure 2013 (Russia). Also: Decision, *On the Application of Provisions of the Criminal Procedure Code of the Russian Federation Regulating Proceedings in Appeal Instance Court*, No. 26, Russia, Plenum of the Supreme Court, 27 November 2012, at 14 (on file with author, provided by O. Schwartz).
[478] Arts. 389.22(1)-(2), 389.23 Code of Criminal Procedure 2013 (Russia). In addition, Art. 389.22(3) Code of Criminal Procedure 2013 (Russia), referring to Art. 237 Code of Criminal Procedure 2013 (Russia), foresees remittal in certain other specific circumstances.
[479] Ibid., Art. 389.19(4).
[480] Ibid., Art. 389.24.

vacated in favour of a judgment of conviction on appeal.[481] In addition, more stringent conditions attach to the appellate modification of acquittals pronounced in jury trials. Such a judgment may only be reversed on appeal in the following circumstances: (i) the violations of the criminal procedure were such to have restricted the right of the prosecution, the aggrieved party, or of a legal representative to present evidence or to have influenced the questions posed to the jury or the answers provided by the jury; and (ii) the presiding judge of the court of first instance has failed to denote the ambiguous and contradictory nature of a judgment and has not proposed to the jury to specify the question list.[482]

5. Synthesis

The various approaches to appellate review have been described as one of "the major differences" between existing Common Law and Civil Law systems.[483] It has, nevertheless, also been suggested that their appellate procedures have converged as a result of factors like "historical events, technological changes, the emergence of the right to appeal as a human right, and the increasing emphasis on orality in continental criminal procedure". [484] Accordingly, this chapter will take stock of the major similarities and dissimilarities between, on the one hand, Common Law systems and, on the other hand, Civil Law and mixed systems[485]. It will, thereafter account for the similarities and/or dissimilarities.

5.1. Similarities and Dissimilarities

5.1.1. Availability of Appellate Review

Commencing with the major similarity between the systems, appellate review at second instance has become ubiquitous in both contemporary Common Law systems[486] and Civil Law systems.[487] Historically, this has not been the case. It has been written, in general, that

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[481] Decision, On the Application of Provisions of the Criminal Procedure Code of the Russian Federation Regulating Proceedings in Appeal Instance Court, No. 26, Russia, Plenum of the Supreme Court, 27 November 2012, at 21 (on file with author, provided by O. Schwartz). In this regard, the Supreme Court also referred to Art. 50(3) Constitution 1993 (Russia).
[482] Art. 389.25 Code of Criminal Procedure 2013 (Russia).
[483] J. Spencer, 'Introduction', in M. Delmas-Marty and J. Spencer (eds.) *European Criminal Procedures* 1 (Cambridge: Cambridge University Press, 2002), at 27, 28-30.
[484] P. Marshall, 'A Comparative Analysis of the Right to Appeal', 22(1) *Duke Journal of Comparative & International Law* (2011), at 45. Standards of international human rights law concerning the right to appeal will be addressed in Part II.
[485] As discussed, mixed systems have, by and large, maintained a Civil Law type of appellate procedure. Mixed systems may, thus, be equated with Civil Law systems for these purposes. See: Part I, Chapter 4.
[486] Part I, Chapter 2.
[487] Part I, Chapter 1; Part I, Chapter 3.

"essential characteristics of the accusatorial type [of criminal procedure] [i.e. Common Law] include elements such as […] possibly even the absence of appellate procedure".[488] The remnants of this characterisation are indeed visible in the aforementioned Common Law jurisdictions. The early criminal procedural systems of neither England & Wales nor South Africa contained a right to appeal a conviction,[489] whilst the U.S. Supreme Court has explicitly confirmed this right had not been conceived of as a constitutional guarantee by the framers of the U.S. Constitution.[490] However, this description has become obsolete nowadays. Notwithstanding their belated introduction or unequal legal status, the evolution of modern Common Law jurisdiction has introduced significant rights of appeal.

5.1.2. Parties' Right to Appeal

The first major dissimilarity arises in respect of the extent of the right to appeal afforded to the parties in a criminal trial. In Common Law jurisdictions, appellate rights are markedly asymmetrical in favour of defendants, while Civil Law jurisdictions do not draw such a distinction. The double jeopardy doctrine bars prosecutorial appeals from first instance acquittals on questions of fact in Common Law jurisdictions.[491] On the other hand, Civil Law systems have placed the appellate rights of the prosecution on par with those of the accused, including in respect of first instance acquittals.[492] In the development of its appellate system concerning serious offences, France has even repealed an initial ban on such appeals.[493] In addition, these systems conceive of prosecutorial rights of appeal in a broader manner, considering that prosecutorial authorities may also appeal in favour of the accused.[494]

However, this division is not absolute. Whereas prosecutorial appeals based on questions of law and matters of sentencing have been traditionally permitted,[495] significant exceptions to double jeopardy protection have been carved out in Common Law jurisdictions. Furthermore, the reduction of prosecutorial rights of appeal has come under strain, mainly as a result of the

[488] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* (1972-1973), at 556.
[489] Part I, Chapter 3.1; Part I, Chapter 3.3.
[490] Part I, Chapter 3.2.
[491] Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3.
[492] Part I, Chapter 2.1; Part I, Chapter 2.2; Part I, Chapter 2.3.
[493] Part I, Chapter 2.1.
[494] Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3.
[495] Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3.

rebalancing of criminal justice systems towards victims' interests.[496] England & Wales have adopted legal reforms to broaden prosecutorial rights of appeal in relation to questions of law and, to a certain degree, fact. In South Africa, a significant limitation of this facet of double jeopardy protection has been proposed, but not implemented hitherto.[497]

5.1.3. Impediments to Appellate Review

A further divergence between Common Law and Civil Law jurisdictions exists in relation to the impediments erected in respect of appellate review. Common Law systems employ various disincentives to dissuade the parties from entering the appellate process. All three systems discussed restrain the possibility of appellate review regarding guilty pleas, either by considering rights of appeal forfeited[498] or attaching additional requirements to such appellate review[499]. Considering the pervasiveness of plea-bargaining in Common Law systems, especially in the U.S.,[500] this element heavily restricts access to the appellate process in practice. Moreover, England & Wales and South Africa require leave to appeal,[501] which seeks to prevent "appellate courts from being flooded".[502] Finally, impediments to appellate review particular to specific Common Law jurisdictions may be identified. England & Wales make use of the "loss of time" measure[503] and the U.S. employs the "raise or waive" doctrine and disentitles absconders of appellate rights[504]. Conversely, Civil Law jurisdictions guarantee, in general, access to appellate review in second instance as of right.[505]

Nevertheless, there is no perfect dichotomy in this regard. On the one hand, despite the aforementioned restrictions to access to appellate review, U.S. jurisdictions widely disavow a requirement of leave to appeal at second instance,[506] which reflects the "principle that errors will always be committed at trial level and that appellate judges must detect and correct

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[496] I. Dennis, 'Prosecution Appeals and Retrial for Serious Offences', 8 *Criminal Law Review* 619 (2004), at 637; South African Law Commission, *The Right of the Director of Public Prosecutions to Appeal on Questions of Fact* (South Africa), December 2000, at 5.10–5.17.
[497] Part I, Chapter 3.3.
[498] Part I, Chapter 3.2.
[499] Part I, Chapter 3.1; Part I, Chapter 3.3.
[500] R. Allen, J. Hoffmann, D. Livingston, and W. Stuntz, *Comprehensive Criminal Procedure* (New York: Aspen Publishers, 2005), at 1161.
[501] Part I, Chapter 3.1; Part I, Chapter 3.3.
[502] R. Pattenden, English Criminal Appeals - 1844-1994: Appeals against Conviction and Sentence in England and Wales (Oxford: Clarendon Press, 1996), at 92.
[503] Part I, Chapter 3.1.
[504] Part I, Chapter 3.2.
[505] Part I, Chapter 2.1; Part I, Chapter 2.2; Part I, Chapter 2.3; Part I, Chapter 4.1; Part I, Chapter 4.2.
[506] Part I, Chapter 3.2.

them".[507] On the other hand, certain Civil Law jurisdictions have put mechanisms in place that effectively limit access to appellate review. Germany's rigorous formal requirements and its abridged appellate procedure ensure that appellate complaints are, in the main, either rejected *in limine* or adjudicated summarily.[508] Moreover, in Argentina, a first instance court may deny an application for appellate review, although such a denial may be set aside.[509]

5.1.4. Oral or Written Argument

Common Law and Civil Law jurisdictions also differ in respect of the type of argument on appeal. As to Common Law jurisdictions, the U.S. and South Africa emphasise written arguments, although oral proceedings may form part of the appellate process too,[510] even though the appellate system of England & Wales is primarily oral.[511] With the exception of the German appellate process,[512] Civil Law appellate jurisdictions are characterised by the opposite preference. France, Italy, and Russia conduct an (adjusted) rerun of proceedings at first instance,[513] which necessarily prioritises oral argument, although Argentinian appellate proceedings, which do not amount to a trial *de novo,* are also mainly of an oral nature.[514]

5.1.5. Additional Evidence

Diverging approaches to additional evidence in appellate proceedings have been adopted by Common Law and Civil Law systems. The former adopt, on balance, a more restrained stance than the latter. Whereas Common Law systems either deny the admission of such evidence[515] or admit it in exceptional circumstances only[516], certain Civil Law jurisdictions boast wide possibilities to present additional evidence on appeal,[517] even though German appellate proceedings proceed on the basis of the trial record exclusively.[518]

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[507] R. Pattenden, English Criminal Appeals - 1844-1994: Appeals against Conviction and Sentence in England and Wales (Oxford: Clarendon Press, 1996), at 92.
[508] Part I, Chapter 2.2.
[509] Part I, Chapter 4.1.
[510] Part I, Chapter 3.2; Part I, Chapter 3.3.
[511] Part I, Chapter 3.1.
[512] Part I, Chapter 2.2.
[513] Part I, Chapter 2.1; Part I, Chapter 4.1; Part I, Chapter 4.2.
[514] Part I, Chapter 2.3.
[515] Part I, Chapter 3.2.
[516] Part I, Chapter 3.1; Part I, Chapter 3.3.
[517] Part I, Chapter 2.1; Part I, Chapter 4.1; Part I, Chapter 4.2.
[518] Part I, Chapter 2.2.

5.1.6. Scope of Appellate Review

Whereas both Common Law and Civil Law appellate systems permit *de novo* review of questions of law,[519] a more diverse picture appears in relation to questions of fact. In general, Common Law courts of second instance have traditionally been considered to exercise relatively limited powers in reviewing questions of fact. Indeed, deference is owed to courts of first instance, which are in a position to directly observe witness testimony.[520] However, a trend towards widening these powers has emerged. England & Wales have enacted reforms to ensure more intensive appellate intervention, such as the simplification of the standard for appellate review and more intensive interference in the context of fresh evidence,[521] whereas mechanisms such as the doctrine of "mixed questions of law and fact" have rendered almost any issue "appropriate for appellate intervention" in the U.S.[522] Civil Law systems display even more diversity in this regard. France, Italy, and Russia allow for a trial *de novo* on questions of fact.[523] France and Russia have even introduced *de novo* review for the most serious crimes at the expense of appellate review of questions of law.[524] However, the appellate systems of Germany and Argentina are more equivocal. In the former, appellate proceedings are, in principle, reserved for questions of law, but, at the same time, the scope of appellate review has been broadened to better accommodate questions of fact.[525] Similarly, having first scaled down the scope of review in appellate proceedings in second instance from *de novo* review to review of questions of law, the courts of the latter, spurred on by human rights obligations, have expanded it to a certain degree.[526]

5.1.7. Appellate Courts' Powers

The powers of appellate courts throughout the Common Law and Civil Law world differ in scope and application. The first such distinction is that, whilst all reviewed jurisdictions allow appellate courts to resolve appellate matters instantaneously, as opposed to a remittal to a lower court,[527] Common Law systems are more restrained than Civil Law systems. Civil Law

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[519] Part I, Chapter 2.1; Part I, Chapter 2.2; Part I, 2.3; Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3; Part I, Chapter 4.1; Part I, Chapter 4.2.
[520] Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3.
[521] Part I, Chapter 3.1. Also: A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 378.
[522] M. Shapiro, 'Appeal', 14(3) *Law & Society Review* 629 (1979-1980), at 648. Also: Part I, Chapter 3.2.
[523] Part I, Chapter 2.1; Part I, Chapter 4.1; Part I, Chapter 4.2.
[524] Part I, Chapter 2.1; Part I, Chapter 4.2.
[525] Part I, Chapter 2.2.
[526] Part I, Chapter 2.3.
[527] Part I, Chapter 2.1; Part I, Chapter 2.2; Part I, Chapter 2.3; Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3; Part I, Chapter 4.1; Part I, Chapter 4.2.

jurisdictions more readily allow appellate courts to requalify decisions adopted by first instance courts in legal terms than Common Law jurisdictions,[528] even though this possibility is, at least, available to the appellate courts of England & Wales too[529]. Moreover, instantaneous appellate resolution to the detriment of the accused has been invariably applied, although the main restriction imposed by Common Law jurisdictions is the need for an appeal on grounds of law[530] and, in Civil Law jurisdictions, such a course of action is most commonly excluded for appeals instituted by the accused only.[531] The second distinction is that Common Law and Civil Law jurisdictions permit appellate courts to remit a case for renewed adjudication to a lower court,[532] but the extent to which this power is applied varies. U.S. appellate courts prioritise remittal over instantaneous resolution,[533] which may be interpreted to extend to England & Wales and South Africa too, at least in respect of appeals on matters of fact, because of the deferential attitude of Common Law appellate courts in this regard.[534] The Common Law jurisdictions are joined by Germany on this matter, probably as a result of the same limitation applied to its appellate system.[535] On the other hand, Civil Law systems, in particular those permitting *de novo* review, divulge the opposite preference.[536]

5.1.8. Functions of Appellate Review

Common Law and Civil Law systems further differ as to the emphasis placed on the particular functions of appellate review. The former prioritise the "systemic" function of appellate review over its "quality-control" function to a greater degree than the latter.

This distinction may be deduced from the differing treatment of questions of law and questions of fact in these systems. Appellate review of questions of law primarily engage the "systemic" function of appellate review, since the ramifications of such questions are more generalizable to other situations. Questions of fact, on the other hand, are predominantly

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[528] Part I, Chapter 2.1; Part I, Chapter 4.1; Part I, Chapter 4.2.
[529] Part I, Chapter 3.1.
[530] E.g., Part I, Chapter 3.2; Part I, Chapter 3.3. Contra, e.g., Part I, Chapter 2.1; Part I, Chapter 4.1; Part I, Chapter 4.2.
[531] E.g., Part I, Chapter 2.1; Part I, Chapter 2.2; Part I, Chapter 2.3. Contra, e.g., Part I, Chapter 3.3.
[532] Part I, Chapter 2.1; Part I, Chapter 2.2; Part I, Chapter 2.3; Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3; Part I, Chapter 4.1; Part I, Chapter 4.2.
[533] Part I, Chapter 3.2.
[534] Part I, Chapter 5.1.6; Part I, Chapter 5.1.7.
[535] Part I, Chapter 2.2.
[536] Part I, Chapter 2.1; Part I, Chapter 4.1; Part I, Chapter 4.2. Also: R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1556.

concerned with the "quality-control" function of appellate review, as their effects remain principally confined to the specific situations under consideration. The appellate systems of Common Law and Civil Law jurisdictions espouse, as mentioned, diverging approaches in this regard. Whereas appellate review of questions of fact in Common Law systems is more restrained, questions of law are invariably reviewed *de novo* at second instance.[537] There are also more specific indications of the prevalence of questions of law over questions of fact in Common Law settings. For instance, in England & Wales, the powers of the CACD to quash a factually correct conviction that has been tainted by procedural irregularities are mired in ambiguity.[538] Thus, the need to correct a question of law as an exercise of the "systemic" functions of the CACD is uncontested, but there is a clear reluctance to assign "quality-control" effects to such a decision. On the other hand, the appellate systems of Civil Law countries,[539] even those that nominally restrict appellate review to questions of law,[540] provide for more room for appellate review of matters of fact. In such constructions, the "systemic" function of appellate review is mainly engaged after the "quality-control" function.

5.2. The Dissimilarities Explained

The preceding assessment indicates that, beyond the fact that Common Law systems have come to approximate Civil Law systems in respect of the availability of appellate control at second instance and that tentative signs of convergence in respect of other facets of appellate review may be distinguishable, the dissimilarities significantly outweigh the similarities. Common Law and Civil Law systems pursue widely divergent approaches regarding prosecutorial rights of appeal, access to appellate review, the conduct of appellate proceedings (i.e. preferences for oral or written arguments, additional evidence, and the scope of appellate review), appellate courts' powers, and the functions of appellate review.

Some of the aforementioned differences have been explained by particular aspects of the internal configurations of Common Law and Civil Law systems. However, aside from the question whether such explanations encompass the remaining differences, they do not account for the specific differentiation in full. Accordingly, after discussing the two main arguments raised in this respect, more structural reasons will be presented.

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[537] Part I, Chapter 3.1; Part I, Chapter 3.2; Part I, Chapter 3.3.
[538] Part I, Chapter 3.1.
[539] Part I, Chapter 2.1; Part I, Chapter 4.1; Part I, Chapter 4.2.
[540] Part I, Chapter 2.2; Part I, Chapter 2.3.

5.2.1. Internal Configurations

The divergences between Common Law and Civil Law in respect of the rights of appeal held by the main parties in the criminal process and the scope of appellate review have been explained on the basis of the systems' internal configurations.

5.2.1.1. Lay Participation

The differences in appellate rights afforded to prosecutorial authorities and the accused have been linked to the extent of lay participation permitted in criminal justice.[541] Many Civil Law systems do not leave room for such participation at all.[542] In the Civil Law systems that do, lay participation is usually confined to the appointment of lay assessors alongside professional judges in the decision-making process.[543] Many Common Law systems, on the other hand, entrust fact-finding prerogatives exclusively to juries.[544] Lay participation has been assigned a pivotal role in Common Law systems, since "juries […] legitimise the criminal justice system by making the decision of guilt one for a randomly selected group of the defendant's peers".[545] An appeal by the prosecution on the basis of alleged errors of fact concerning a jury decision of acquittal would, thus, distort this rationale. It would allow a peers' assessment of not-guilty to be second-guessed by detached bureaucrats. This has been expressed as "the veto power that the jury enjoy over the prosecutorial power of the state".[546] A more specific element of the jury's role in criminal proceedings also militates against such prosecutorial rights. Juries "inject humanity into the criminal process", since they may acquit against the dictates of the law on the basis of, for instance, moral or ethical considerations ("jury equity"

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[541] M. Damaška, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (New Haven: Yale University Press (1986), at 18-19, 24-25.
[542] E.g., A. Carrió and A. Garro, 'Argentina', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 3 (Durham: Carolina Academic Press, 2007), at 48.
[543] E.g., R. Frase, 'France', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 201 (Durham: Carolina Academic Press, 2007), at 229-230; T. Weigend, 'Germany', in C. Bradley (ed.), *Criminal Procedure – A Worldwide Study* 243 (Durham: Carolina Academic Press, 2007), at 263.
[544] This distinction is, of course, largely theoretical, considering that the majority of criminal cases are decided without the involvement of a jury in Common Law systems in view of, for instance, the dominance of plea-bargaining. See: e.g., W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (2009), at 15; A. Ashworth and M. Redmayne, at 15; A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 26.
[545] R. Pattenden, 'Prosecution Appeals against Judges' Rulings', 12 *Criminal Law Review* 971 (2000), at 985.
[546] G. Fletcher, 'The Influence of the Common Law and Civil Law Tradition on International Criminal Law', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* 104 (Oxford: Oxford University Press, 2009), at 108.

or "jury nullification").[547] Appellate judges are, on the other hand, bound by the law and may not be led by such concerns. A prosecutorial appeal could, thus, also thwart this aspect of a jury trial.[548] Hence, the enhanced emphasis on lay participation in Common Law systems warrants a commensurate reduction in the appellate rights of prosecutorial authorities. At the same time, the absence or reduced degree of lay participation in Civil Law jurisdictions is conducive to broad rights of appeal held by prosecutors.

Nevertheless, the adequacy of this line of argumentation may be questioned. Commencing with the latter aspect, "jury equity" (or "jury nullification") appears to constitute an inadequate basis for the removal of a component of the prosecution's right to appeal. Opponents advance that this notion seems "irreconcilable with any intelligible notion of the rule of law" and that it "ignores the established fact that, at least occasionally, juries behave with astonishing irresponsibility".[549] Thus, even if it could sustain a controlled approach to appeals from acquittals by the prosecution, an across-the-board exclusion demands too much from a mechanism that primarily seeks to humanise criminal justice. In addition, more generally, lay participation in the criminal process is not completely determinative for double jeopardy protection. France has provided for lay participation in its system of criminal justice together with the attendant restriction of prosecutorial rights of appeal but subsequently rescinded the latter aspect.[550] Similarly, lay participation was never matched with restrained appellate rights of the prosecution in Russia.[551] Therefore, from a comparative perspective the two notions do not exclude each other. However, it could, of course, be objected that such a combination is ill-conceived. Those critical of injecting adversarial elements into a non-adversarial setting might argue that the uncontrolled transplant of lay participation misconstrues the relevant notions or overlooks related fair trial aspects. Nevertheless, the Common Law approach is not coherent in respect of this matter. Many Common Law jurisdictions also prevent the prosecution from appealing an acquittal on the facts in judge-

[547] R. Pattenden, 'Prosecution Appeals against Judges' Rulings', 12 *Criminal Law Review* 971 (2000), at 985. Also: W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (2009), at 1223.
[548] R. Pattenden, 'Prosecution Appeals against Judges' Rulings', 12 *Criminal Law Review* 971 (2000), at 985.
[549] J. Spencer, 'Does our Present Criminal Appeal System Make Sense?', 8 *Criminal Law Review* 677 (2006), at 688.
[550] Part I, Chapter 2.1.
[551] Part I, Chapter 4.2. However, as described, the threshold for reversal of a judgment involving a jury has been raised in comparison with judge-only judgments.

only proceedings.[552] Thus, even from an internal perspective, lay participation is not decisive for the removal of prosecutorial rights of appeal.

5.2.1.2. Fact-Finding

It has, furthermore, been contended that the differing scopes of appellate proceedings in Common Law and Civil Law systems result from the inferior fact-finding position of adversarial appellate courts vis-à-vis their non-adversarial counterparts. In this regard, the variations concerning lay participation at first instance entail further consequences for subsequent phases of a criminal trial. In the Common Law setting, juries do not provide, in general, a reasoned judgment[553] and, in respect of a trial by judge alone, the need for reasoning may be limited.[554] Civil Law judges, on the other hand, generally provide a reasoned opinion at first instance.[555] Therefore, lacking access to the specific reasons underlying a verdict of guilt or innocence, Common Law appellate courts' review would be necessarily more restrained than the review performed by Civil Law appellate courts. More importantly, the disparate approaches are considered logical corollaries of the types of appellate proceedings in these systems. As discussed, Common Law appellate courts have developed a deferential attitude concerning trial courts' findings of fact, as they are generally constrained to a review of the record and rarely admit additional evidence or rehear first instance evidence.[556] Conversely, in the Civil Law context, a deferential stance is, in general, less compatible with appellate proceedings involving either a complete *de novo* trial or a more flexible approach to first instance evidence and additional evidence.[557] Accordingly, Civil Law judges are said to be in a better position to exercise far-reaching appellate control than Common Law judges, considering that they face fewer fact-finding constraints.

However, these arguments also fail to fully explain the relevant dissimilarities. The systems of Italy and Russia demonstrate that trial proceedings instilled with Common Law elements

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[552] M. Bohlander, 'Prosecution Appeals against Acquittals in Bench Trials - The Criminal Justice Act 2003 and the Government's Fear of the Dark', 69(4) *Journal of Criminal Law* 326 (2005); W. LaFave, J. Israel, N. King, and O. Kerr, *Criminal Procedure* (St. Paul: West Group, 2009), at 1223-1224.
[553] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 377; T. Weigend, 'Is the Criminal Process about Truth?: a German Perspective', 26(1) *Harvard Journal of Law & Public Policy* 157 (2003), at 166.
[554] M. Bohlander, 'Prosecution Appeals against Acquittals in Bench Trials - The Criminal Justice Act 2003 and the Government's Fear of the Dark', 69(4) *Journal of Criminal Law* 326 (2005), at 326.
[555] T. Weigend, 'Is the Criminal Process about Truth?: a German Perspective', 26(1) *Harvard Journal of Law & Public Policy* 157 (2003), at 166-167.
[556] Part I, Chapter 5.1.5; Part I, Chapter 5.1.6.
[557] Part I, Chapter 5.1.5; Part I, Chapter 5.1.6.

can be combined with intensive appellate scrutiny,[558] including in respect of jury trials.[559] However, as discussed, such amalgamations may be subject to criticism. Even so, it is not undisputed that the aforementioned factors must necessarily result in narrow appellate decision-making in the adversarial context either. The conventional account of the reduced ability of Common Law appellate courts to deal with questions of fact has been rejected on two grounds. First, it has been argued that, contrary to conventional wisdom, appellate courts may enjoy institutional advantages over first instance judges and juries in relation to fact-finding. The ephemeral nature of witness testimony renders information retention difficult and, in addition, it "encourages an intuitive and emotional thought process", as opposed to abstract and logical thinking.[560] Transcript-based review is, on the other hand, lasting, which allows for more systematic and rational evaluation of different sources of evidence.[561] Moreover, experimental evidence suggests that observing demeanour may be of limited value in assessing credibility and that reading a transcript is more effective in detecting lies.[562] As repeat players, appellate judges are also "likely to have greater experience" vis-à-vis jurors.[563] Furthermore, appellate courts are "at least as well equipped as trial-level fact finders to assess documentary and circumstantial evidence".[564] Second, technological innovation has tempered the institutional differences between first instance and appellate courts. "Video technology refutes the rhetoric of necessity that has long been invoked to defend traditional standards of appellate court deference to trial court decisionmaking".[565] Accordingly, "[a]ppellate courts […] now can have access via video to the same 'data' that presumably inform the discretionary decisions of trial judges".[566] These arguments similarly weaken the justification

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[558] Part I, Chapter 4.1; Part I, Chapter 4.2.
[559] Part I, Chapter 4.2.
[560] C. Oldfather, 'Appellate Courts, Historical Facts, and the Civil-Criminal Distinction', 57(2) *Vanderbilt Law Review* 437 (2004), at 451-454; K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* 591 (2009-2010), at 620.
[561] K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* 591 (2009-2010), at 620.
[562] C. Oldfather, 'Appellate Courts, Historical Facts, and the Civil-Criminal Distinction', 57(2) *Vanderbilt Law Review* 437 (2004), at 457-459; K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* 591 (2009-2010), at 621.
[563] C. Oldfather, 'Appellate Courts, Historical Facts, and the Civil-Criminal Distinction', 57(2) *Vanderbilt Law Review* 437 (2004), at 459-463; D. Risinger, 'Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims', 41(4) *Houston Law Review* 1281 (2004), at 1314; K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* 591 (2009-2010), at 623.
[564] C. Oldfather, 'Appellate Courts, Historical Facts, and the Civil-Criminal Distinction', 57(2) *Vanderbilt Law Review* 437 (2004), at 439, 463-466; K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* 591 (2009-2010), at 622.
[565] R. Owen and M. Mather, 'Thawing Out the 'Cold Record': Some Thoughts on how Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review', 2(2) *Journal of Appellate Practice & Process* 411 (2000), at 412.
[566] Ibid., at 412.

for limited appellate intervention on the basis of the lack of reasons for a jury verdict. Transcripts, in conjunction with video-recordings or other means, may adequately replace a reasoned opinion provided by a first instance court as a basis for appellate decision-making.

5.2.2. Structural Differences

A more comprehensive explication of the divide between the systems' appellate procedures must be sought elsewhere. In this respect, the relationship between the types of decision-making in the legal process, the extent of judicial truth-seeking, and the relationship between the sources of law and appellate review will be discussed.

5.2.2.1. Decision-Making

Common Law and Civil Law systems operate according to dissimilar processes of decision-making in the legal process. It has been remarked, for instance, that, in the coordinate variation on the administration of justice encountered in Common Law systems, "[a]n essentially homogeneous single level of authority spawns proceedings that center around the original […] adjudicator".[567] In other words, such a system "concentrates on the trial as the relevant locus for fact-finding".[568] In this regard, the U.S. Supreme Court has revealingly held that a first instance trial should be "the 'main event' […] rather than a 'tryout on the road'".[569] On the contrary, the hierarchical model of Civil Law systems does not focus to the same extent on the trial stage in relation to decision-making. It allows "participants at several stages" to shape the fact-finding process, including on the appellate level(s).[570] Therefore, the coordinate model employs "concentrated" decision-making, which is limited to a large extent to a single stage of the legal process, and the hierarchical model is characterised by "pluralistic" decision-making, which persists throughout sequential stages of a trial. These different types of decision-making entail obvious ramifications for the operation of the principle of finality in the different systems. Although it may be considered for both systems that "[t]here is value to the parties, and to society as a whole, in accepting that a contested

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[567] M. Damaška, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (New Haven: Yale University Press, 1986), at 57.
[568] T. Weigend, 'Is the Criminal Process about Truth?: a German Perspective', 26(1) *Harvard Journal of Law & Public Policy* 157 (2003), at 160.
[569] Judgment, *Wainwright v. Sykes*, 433 U.S. 72, U.S., Supreme Court, 23 June 1977.
[570] G. Fletcher, 'The Influence of the Common Law and Civil Law Tradition on International Criminal Law', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* 104 (Oxford: Oxford University Press, 2009), at 109.

issue has been resolved,"[571] the principle of finality manifests itself differently in these contexts. In Common Law systems, "concentrated" decision-making logically implies that the "original" adjudicator is also the "presumptively final" one,[572] which suggests that first instance decisions are awarded a high degree of finality. "Pluralistic" decision-making in Civil Law systems entails that the finality of a first instance judgment is postponed until all appellate remedies have been exhausted,[573] thus entailing a decreased degree of finality.

While the systems' differently structured pre-trial procedures have been explained on the basis of this distinction,[574] they also account, in part, for the diverging conceptions of appellate proceedings in Common Law and Civil Law systems. Proceedings employing "concentrated" decision-making and increased first instance finality necessarily seek to insulate first instance adjudication, to a high degree, from extraneous adjustment. Therefore, access to appellate review is hampered to ensure that only those claims that have a reasonable chance of success are admitted, appellate proceedings are of a comparatively limited nature (which entails a preference for written argument, a constrained approach to additional evidence, and a reduced scope of appellate review), and appellate courts shy away from instantaneous decision-making. On the other hand, in systems utilising a "pluralistic" decision-making process and reduced first instance finality, appellate review is conceived of broadly and constitutes an important factor in the overall factual and legal assessment. Thus, lowered obstacles to appellate access ensure that appellate courts routinely review first instance decisions and extensive appellate structures supplement the initial decision-making process, which explains the predilection for oral argument, the broadened approach to additional evidence, a wide scope of appellate review, and an aversion from remittal.

5.2.2.2. Truth-Seeking

Whereas the establishment of the truth seems (one of) the primary aim(s) of any system of criminal procedure, it has been contended that the Civil Law "system of procedure is more

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[571] A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), at 399.
[572] M. Damaška, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (New Haven: Yale University Press, 1986), at 57.
[573] Ibid., at 49.
[574] G. Fletcher, 'The Influence of the Common Law and Civil Law Tradition on International Criminal Law', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* 104 (Oxford: Oxford University Press, 2009), at 109; M. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 57.

committed to the search for truth than is the […] adversary system".[575] Thus, in respect of the latter, the primary concern is to ensure that "parties abide by the rules regulating their 'battle'" and "[t]he judgment itself is not so much in the nature of a pronouncement on the true facts of the case; it is, rather, a decision *between* the parties".[576] U.S. judges have remarked, along these lines, that the "adversary system rates truth too low among the values that institutions of justice are meant to serve"[577] and that "storm clouds linger over […] the capacity of the adversarial process to promote effectively the search for truth".[578] Where proceedings are structured like an official enquiry, as in Civil Law systems, "the concern for ascertaining the facts of the case is much more central".[579]

This distinction has been deduced from the uneven distribution of "evidentiary barriers to conviction" faced by prosecutorial authorities in Common Law and Civil Law systems in first instance proceedings.[580] However, this characterisation equally applies to the differing conceptions of appellate review in Common Law and Civil Law systems. For instance, in a general criticism of the importance of appeals in the U.S. system, a U.S. Supreme Court justice derided "the legal community's 'obsessive concern that the result reached in a particular case be the right one'".[581] Indeed, the aforementioned aspects of restrained access to appellate review and the more limited nature of appellate proceedings in Common Law systems clearly reflect the diminished importance attached to the material truth.[582] In addition, the more limited rights of appeal provided to prosecutorial authorities regarding acquittals on questions of fact in Common Law systems may also be explained on this basis. At least to a

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[575] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* 506 (1972-1973), at 513-550.
[576] Ibid., at 581-582.
[577] M. Frankel, 'The Search for Truth: An Umpireal View', 123(5) *University of Pennsylvania Law Review* 1031 (1975), at 1032.
[578] T. Steffen, 'Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble', 4 *Utah Law Review* 799 (1988), at 800.
[579] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study', 121(3) *University of Pennsylvania Law Review* 506 (1972-1973), at 582.
[580] Ibid., at 550, 583-584. This author argues that "the common law prosecutor encounters more obstacles than his continental colleagues in all phases of factfinding activity".
[581] M. Arkin, 'Rethinking the Constitutional Right to a Criminal Appeal', 39 *UCLA Law Review* 503 (1991-1992), at 508. It has similarly been remarked that "it ultimately may be that accuracy and protecting against convicting the innocent are not really the paramount objectives of the [U.S.] appellate system", rather than "to resolve the matter before the court". See; K. Findley, 'Innocence Protection in the Appellate Process', 93(2) *Marquette Law Review* 591 (2009-2010), at 607.
[582] Part I, Chapter 5.1.3; Part I, Chapter 5.1.5; Part I, Chapter 5.1.6. Also: E. Grande, 'Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth', in J. Jackson, M. Langer, and P. Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska* 145 (Oxford: Hart Publishing, 2008), at 159-160.

certain degree,[583] Common Law prosecutors are deprived from the opportunity to redress wrongful acquittals, which prevents the establishment of the material truth in such situations. On the other hand, the reduced obstacles to appellate review and the more expansive nature of appellate review disclose a heightened dedication to the promotion of judicial accuracy in Civil Law systems. Similarly, the fact that the rights of appeal of the prosecution and the defendant have been equated in such systems further reflects the need to correctly appraise relevant facts. Unlike in most Common Law systems, Civil Law prosecutors may appeal for the benefit of the accused, which adds to this commitment.[584]

5.2.2.3. Sources of Law

As indicated, Common Law systems emphasise judicial precedent.[585] On this basis, questions of law assume a central role in appellate proceedings. As to "consistency" in the formulation and application of the law,[586] inferior courts may produce contradictory and erroneous interpretations of the law. In order to preserve the centrality of precedent, Common Law appellate courts must, thus, act as a harmonising factor. With regard to the "development" of the law,[587] Common Law judges retain primary responsibility for the discovery of the law. Since they are located in the upper echelons of judicial hierarchy, Common Law appellate judges, thus, necessarily have far-reaching developmental responsibilities. Conversely, the central role of codified law in Civil Law systems moderates the adherence to precedent.[588] Codified law is more unyielding than a system relying on interpretations by a host of courts, although it remains susceptible to conflicting readings, and emerges mainly from political-legislative processes. Accordingly, the appellate judges of such systems assume a far more limited role in respect of the homogenisation and discovery of the law.

The different sources of law, thus, engender differing dynamics in appellate proceedings. The predominance of unwritten rules stresses the creation of legal certainty and the discovery of the law on appeal, which, in turn, leads to a prioritisation of questions of law and the

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[583] Those opposing double jeopardy reform invoke the increased risk of abuse and, thus, wrongful convictions on appeal. Even so, whether the debate is framed in respect of the possibility of a reduction of wrongfully acquitted persons or the possibility of an increase of wrongfully convicted persons, the required empirical data for such an assessment is lies "beyond our mortal reach". In this regard, see: P. Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary', 65(3) *Modern Law Review* 393 (2002), at 397-401.
[584] Part I, Chapter 2.1; Part I, Chapter 2.2; Part I, Chapter 2.3.
[585] Part I, Chapter 1.1.
[586] Part I, Chapter 5.1.8.
[587] Part I, Chapter 5.1.8.
[588] Part I, Chapter 1.1.

"systemic" function of appellate review in Common Law systems. On the other hand, the application of more stable codified rules of law creates more latitude for factual assessments on appeal and the "quality-control" function of appellate review in Civil Law jurisdictions.

6. Interim Conclusion: Norms of Customary International Law

As suggested by Article 38(1)(b) of the ICJ Statute, two requirements must be fulfilled for a norm to attain the status of customary international law: "a general practice" that must be "accepted as law" (*opinio juris*). In the words of the ICJ, "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[589] As regards the second element, a particular complication arises in relation to the systems of criminal procedure adopted by States domestically. In this regard, it has been noted that the choice for a particular legal system "is very unlikely to be a manifestation of *opinio juris*, except in relation to international human rights", since such a choice "falls well within the province of sovereignty".[590] However, it is not necessary to address whether and to what extent States have arranged their appellate systems on the basis of an understanding that they were obliged to do so as a matter of law. This is because the first requirement does not permit norms of customary international law to be formulated regarding the aforementioned elements of appellate review in second instance.

The requirement of State practice requires both uniformity/consistency and generality.[591] The leading pronouncement of the ICJ regarding the former element declares that it must be established that "the rule invoked […] is in accordance with a constant and uniform usage".[592] However, it is not necessary that the "corresponding practice must be in absolutely rigorous conformity with the rule".[593] In this regard, the ICJ has held that "the conduct of states should, in general, be consistent with such rules, and […] instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of

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[589] Judgment, Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, p. 13, ICJ, 3 June 1985, at 27.
[590] F. Mégret, 'The Sources of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 68 (Oxford: Oxford University Press, 2013), at 71. As discussed, this study will consider norms of international human rights law concerning appellate proceedings on the basis of the internal frameworks of the Ad Hoc Tribunals and ICC.
[591] I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), at 7-8.
[592] Judgment, *Asylum Case (Colombia / Peru)*, I.C.J. Reports 1950, p. 266, ICJ, 20 November 1950, p. 14.
[593] Judgment, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 14, ICJ, 27 June 1986, at 186.

the recognition of a new rule".[594] With respect to the latter element, "[c]ertainly universality [of State practice] is not required".[595] The ICJ has, for instance, considered whether State practice reveals "an increasing and widespread acceptance" of a particular concept.[596]

In general, it has been noted that the practice of States in relation to criminal procedure "is likely to be so divergent and so difficult to analyse out of context that it would provide very little clue as to emerging […] norms" of customary international law.[597] The preceding analysis confirms this assertion in relation to appellate review at second instance in Common Law and Civil Law systems. The practice of Common Law and Civil Law systems is uniform in that such review is invariably made available to the person convicted at first instance and, at least to a certain degree, prosecutorial authorities. Furthermore, the inclusion of the right to appellate review into the Constitutions of several of the jurisdictions reviewed and numerous other jurisdictions constitutes evidence in support of the assertion that this practice arises out of a legal obligation.[598] However, although there is no complete dichotomy, Common Law and Civil Law systems adopt, on balance, contrasting approaches with regard to: (i) the extent of the parties' right to appeal; (ii) impediments to appellate review; (iii) preferences for an oral or written appellate procedure; (iv) additional evidence presented on appeal; and (v) the functions of appellate review. Moreover, despite signals of convergence in relation to the scope of appellate review and appellate courts' powers, the dissimilarities continue to outweigh the similarities between the approaches pursued by these systems.

Such State practice does not reveal an absence of "absolutely rigorous conformity".[599] Rather, such State activity discloses "so much uncertainty and contradiction, so much fluctuation and

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[594] Ibid.
[595] I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), at 7.
[596] Judgment, Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), I.C.J. Reports 1974, p. 3, ICJ, 25 July 1974, at 58.
[597] F. Mégret, 'The Sources of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 68 (Oxford: Oxford University Press, 2013), at 71. Similar: Editors (prepared by S. Vasiliev), 'Introduction', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 1 (Oxford: Oxford University Press, 2013), at 28-29.
[598] S. Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', 3(2) *Duke Journal of Comparative & International Law* 235 (1992-1993), at 287-288. More generally, it has been noted that, "[a]s an increasing number of States provide for a right to an appeal, there is clearly a trend towards such a customary right". See: L. Doswald-Beck, 'Fair Trial, Right to, International Protection', in R. Wolfrum (ed.) *The Max-Planck Encyclopedia of Public International Law* 1104 (Oxford: Oxford University Press, 2013), at 1111.
[599] Judgment, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 14, ICJ, 27 June 1986, at 186.

discrepancy […] that it is not possible to discern in all this any constant and uniform usage".[600] The lack of sufficient State practice mandates the conclusion that no norms of customary international law may be formulated in relation to these elements of appellate review at second instance. As a consequence, it is not possible to define, on this basis, yardsticks that should govern the appellate procedures of the Ad Hoc Tribunals and the ICC.

[600] Judgment, *Asylum Case (Colombia / Peru)*, I.C.J. Reports 1950, p. 266, ICJ, 20 November 1950, p. 15.

PART TWO

Chapter one will describe the inception of the right to appeal in the ICCPR, ECHR, and the ACHR, as well as the rationale underlying this right. Subsequently, the second, third, and fourth chapters will address the different conceptions of the right to appeal in detail. Thereafter, in chapter five, the various approaches espoused by the human rights monitoring bodies and courts will be systematised and the causes of the similarities and dissimilarities will be laid out. Finally, the interim conclusion will set forth the legal consequences of the state of international human rights law regarding fair trial norms relevant to appellate proceedings for the appellate processes of the Ad Hoc Tribunals and the ICC.

1. International Human Rights Law

The efforts to codify human rights following World War II commenced in 1946, when the U.N. Economic and Social Council established a Commission on Human Rights and "instructed it to submit proposals, recommendations and reports regarding, inter alia, an international bill of human rights".[601] This process led to the adoption of the UDHR in 1948[602] and, following extensive preparatory work,[603] the ICCPR in 1966. However, although the ECHR was negotiated, in part, concurrently with the ICCPR,[604] the former was the first instrument to enshrine certain rights enumerated in the UDHR in binding form, since it was adopted in 1950. Whilst the process of negotiations concerning the ACHR was also conducted in parallel to the ICCPR, this instrument was adopted only in 1969.

1.1. Inception of the Right to Appeal

It has been noted that the right to appeal is "one of the more recent human rights of the so-called 'first generation'".[605] The primary reason for this is that such a right did not feature in the first drafts of the ICCPR.[606] It was not until 1959 when, upon an Israeli motion, the

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[601] U.N. General Assembly, Draft International Covenants on Human Rights, Annotation Prepared by the Secretary-General, A/2929, 1 July 1995, at 1 (emphasis in original).
[602] U.N. General Assembly, *Universal Declaration of Human Rights*, A/RES/3/217, 10 December 1948. The UDHR does not contain a right to appeal, as such.
[603] D. Weissbrodt, The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (The Hague: Kluwer Law International, 2001), at 35-75.
[604] ECmHR, *Preparatory Work on Article 6 of the ECHR*, DH(56)11, 8 October 1956, at 9-10, 26.
[605] M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl: N.P. Engel Verlag, 2005), at 348.
[606] D. Weissbrodt, The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (The Hague: Kluwer Law International, 2001), at 43-69. Also: e.g., U.N. General Assembly, Annotations on the Text of the Draft International Covenants on Human Rights, A/2929, 1 July 1955, at 73–92.

proposal to include a right to appeal in the ICCPR was tabled.[607] Such a right was considered by most representatives "as an important guarantee" and it "was pointed out that it expressed a principle which should be applied by States according to the methods they considered appropriate".[608] The initial proposal set forth that "[e]veryone convicted of a crime – other than petty offences – shall have the right to appeal against conviction and sentence to a higher court" as "only a higher court could decide whether a trial had been conducted in accordance with the principles formulated in Article 14" ICCPR.[609] Upon an inquiry whether "the right to appeal involved merely a review of the case by another court or if new evidence had to be introduced", the Israeli delegate explained that he "only intended to provide for some sort of appeal" and, to clarify his intention, the phrase "appeal against conviction and sentence to a higher court" was replaced with "have his conviction and sentence reviewed by a higher tribunal".[610] In addition to its belated development, the right to appeal did not attract significant attention after the entry into force of the ICCPR in 1976. In 1984, in its General Comment 13 on "[e]quality before the courts and the right to a fair and public hearing by an independent court established by law", the HRC illustratively noted that "not enough information has been provided concerning the procedures of appeal" by States Parties.[611] The contours of this guarantee only became somewhat clearer after more widespread consideration of this right by the HRC in the ensuing years, as summarised in General Comment 32 in 2007.[612] It has, nevertheless, been remarked that the HRC's views reveal "many aspects of the right to appeal which the […] [HRC has] not yet" decided.[613]

After the ICCPR had been signed, a Committee of Experts on Human Rights was tasked to "study and report on the problems arising from the co-existence of the European Convention on Human Rights and the United Nations Covenants".[614] This Committee concluded, in

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[607] M. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights (Dordrecht: Martinus Nijhoff Publishers, 1987), at 310.
[608] Ibid., at 310.
[609] D. Weissbrodt, The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (The Hague: Kluwer Law International, 2001), at 74.
[610] Ibid.
[611] HRC, General Comment No. 13: Equality before the Courts and the Right to a Fair and Public hearing by an Independent Court established by Law, 13 April 1984, at 17.
[612] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 45-51.
[613] J. Möller and A. de Zayas, *United Nations Human Rights Committee Case Law 1977 – 2008 - A Handbook* (Kehl: N.P. Engel Verlag, 2009), at 308-309.
[614] Council of Europe, Report of the Committee of Experts on Human Rights to the Committee of Ministers, Problems arising out of the Co-Existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, H(70)7, September 1970, at 2.

relation to the right to a fair trial, that, *inter alia,* the right to appeal clearly involves an obligation "additional to those set out in the" ECHR".[615] Such a right had not been raised in relation to Article 6 ECHR in the drafting history[616] and, following the adoption of the ECHR, the ECmHR specifically concluded that the right to appeal could not be deduced from Article 6 ECHR.[617] However, the Committee of Experts on Human Rights also found that the implications of including such a right "may be very far-reaching", considering that "[i]t might require a third degree of jurisdiction if a person acquitted in the first instance is convicted by a higher tribunal", "there are some cases in which a convicted person does not have a right to his conviction or sentence being reviewed by a higher tribunal according to law […]", and "[i]t is also not clear whether such a review procedure must allow for the review of both the law and the facts".[618] Following a recommendation by the Parliamentary Assembly of the Council of Europe to the Committee of Ministers to, *inter alia*, "endeavour to insert as many as possible of the substantive provisions of the […] [ICCPR] in the" ECHR[619] and further preparatory work,[620] the work of this Committee culminated in the adoption of Protocol 7 ECHR. This Protocol has not addressed all the differences between the ICCPR and the ECHR, since "the committee of experts kept in mind in particular the need to include in the […] [ECHR] only such rights as could be stated in sufficiently specific terms to be guaranteed within the framework of the system of control instituted by the" ECHR.[621] However, it enshrines, *inter alia,* a "[r]ight of appeal in criminal matters", accompanied by certain exceptions.[622] Even so, following the adoption of Protocol 7 ECHR, this version of the right to appeal has, like Article 14(5) ICCPR, been applied in a relatively limited manner in the jurisprudence of the Strasbourg organs. Whereas complaints based on Article 2 Protocol 7 ECHR began to be assessed more intensively towards the mid-1990s, the first judgment on the merits was only delivered in the early 2000s.[623]

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[615] Ibid., at 3.
[616] ECmHR, Preparatory Work on Article 6 of the ECHR, DH(56)11, 8 October 1956.
[617] Judgment, *Köplinger v. Austria*, Application No. 1850/63, ECmHR, 29 March 1966, referring to an earlier decision of 20 December 1957 (Application No. 277/57) with the same outcome.
[618] Council of Europe, Report of the Committee of Experts on Human Rights to the Committee of Ministers, Problems arising out of the Co-Existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, H(70)7, September 1970, at 144.
[619] Parliamentary Assembly of the Council of Europe, *Protection of Human Rights in Europe*, Recommendation 791 (1976), 17 September 1976, at 12(c).
[620] Council of Europe, Explanatory Report Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 17, 22 November 1984, at 3, 5.
[621] Ibid., at 3.
[622] Art. 2 Protocol 7 ECHR.
[623] Judgment, *Krombach v. France*, Application No. 29731/96, ECtHR, 13 February 2001.

Like its European counterpart, questions have arisen as to the co-existence and coordination between the proposed ACHR and the ICCPR.[624] After the adoption of the latter, "a comparative study of the Draft Convention on Human Rights prepared by the Inter-American Council of Jurists, the international covenants on human rights of the United Nations, and the changes proposed by the Inter-American Commission on Human Rights to the draft convention prepared by the Inter-American Council of Jurists" similarly noted certain differences between the provisions on the right to a fair trial in the ICCPR and ACHR,[625] but ultimately concluded that the systems could coexist.[626] Thereafter, the IACmHR was requested "to draw up a revised and completed text of a preliminary draft convention" and to ensure "harmony with the Covenants of the United Nations".[627]

However, as with the ICCPR, the right to appeal was not considered a priority in the context of the ACHR and it was shaped at a relatively advanced stage of its *travaux préparatoires.* Aside from the draft of the Government of Chile, the right to appeal was not foreseen in other proposals for an ACHR.[628] In its study of these drafts, the IACmHR "decided to take into special consideration the experience of the European countries that approved the […] [ECHR] and the discussions that took place during the preparation of the draft United Nations Agreements on Human Rights".[629] Consequently, the IACmHR suggested several amendments,[630] proposing, *inter alia*, that Article 6(2) of the Inter-American Council of Jurists' draft should be modified to include a right to appeal: "[d]ue process in penal matters should cover the following minimum guarantees: […] h. the right of appeal to a higher court of the decision handed down in the first instance".[631] Thereafter, the aforementioned comparative study noted certain differences between the provisions on the right to a fair trial,

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[624] IACmHR, *Report on the Work Accomplished during its Seventeenth Session*, OEA/Ser.L/V/11 18, Doc. 25, 30 July 1968, at 4, 14.
[625] IACmHR, Inter-American Yearbook on Human Rights, 1968, at 197.
[626] Ibid., at 211, 385-387.
[627] IACmHR, *Report on the Work Accomplished during its Nineteenth Session*, OEA/Ser.L/V/II.19, Doc. 52, 11 February 1969, at 30.
[628] IACmHR, Comparative Study of the Draft Convention on Human Rights Prepared by the Inter-American Council of Jurists (Approved at its Fourteenth Meeting, Santiago, Chile, 1959) and those Presented by Uruguay and Chile at the Second Special Inter-American Conference (Rio de Janeiro 1965), OEA/Ser.L/V/II.14 Doc. 7, 7 April 1966, at 9-13.
[629] IACmHR, Report on the Work Accomplished during its Fourteenth Session, OEA/Ser.UV/ii.15, Doc. 29, 14 March 1967, at 52.
[630] Ibid., at 56; IACmHR, *Report on the Work Accomplished during its Fifteenth Session*, OEA/Ser.L/V/II,16, Doc. 20, 26 July 1967, at 28-33, Appendix I.
[631] IACmHR, *Report on the Work Accomplished during its Fourteenth Session*, OEA/Ser.UV/ii.15, Doc. 29, 14 March 1967, at 56; IACmHR, *Report on the Work Accomplished during its Fifteenth Session*, OEA/Ser.L/V/II,16, Doc. 20, 26 July 1967, Appendix I.

but did not assess the right to appeal.[632] The subsequent preparatory work did not subject the right to appeal to meaningful alteration either. Article 7(2)(i) of the 1968 draft prepared by the IACmHR enshrined "the right to appeal a first instance judgment to a higher court".[633] Thereafter, during the Inter-American Specialised Conference on Human Rights,[634] the reference to "a first instance judgment" was deleted upon an Ecuadorian amendment, on the basis that some countries have two instances, but perhaps others may have as many as three.[635] A further reorganisation of the text ensured that the current version of the right to appeal was laid down in Article 8(2)(h) ACHR. Nevertheless, no different from the views of the HRC and the judgments of the Strasbourg organs, the IACtHR's jurisprudence concerning Article 8(2)(h) ACHR has been restrained. Above and beyond general institutional difficulties in its early functioning,[636] it has addressed a limited aspect of the right to appeal in 1999[637] and commenced considering it in a more extensive manner only as of 2004.[638]

1.2. Functions of the Right to Appeal

The rationale underlying the right to appeal has not attracted significant attention. In respect of the ICCPR, it has been remarked that appeals generally "function as a mechanism whereby parties can obtain a more favourable outcome to the proceedings" and "promote ideals such as consistency and fairness and regulate uniform interpretation of the law" but, "[w]ithin the framework of human rights, only the first of these aspects can be of relevance".[639] Similarly, the IACtHR advanced that such a right "seeks to protect the right of defense, to the extent that it offers the possibility of bringing an action to prevent a decision adopted in a flawed process and one that contains errors from becoming final".[640] International human rights law, thus, establishes minimum touchstones for the "quality-control" function of appellate review.[641]

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[632] IACmHR, Inter-American Yearbook on Human Rights, 1968, at 197.
[633] IACmHR, *Report on the Work Accomplished during its Nineteenth Session*, OEA/Ser.L/V/II.19, Doc. 52, 11 February 1969, at 41, Appendix I.
[634] Ibid., at 30.
[635] Inter-American Specialized Conference on Human Rights, *Acts and Documents*, OEA/Ser.K/XVI/1.2, San José, Costa Rica, 7-22 November 1969, at 202.
[636] L. Burgorgue-Larsen and M. Úbeda de Torres, *The Inter-American Court of Human Rights - Case Law and Commentary* (Oxford: Oxford University Press, 2011), at 7-8.
[637] Judgment, *Castillo Petruzzi et al v. Peru*, Series C. No. 42, IACtHR, 30 May 1999.
[638] Judgment, *Herrera-Ulloa v. Costa Rica*, Series C. No. 106, IACtHR, 2 July 2004.
[639] S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 362.
[640] Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 98-99.
[641] Part I, Chapter 1.2.

2. ICCPR

In light of its specific subject matter, the HRC has mainly invoked Article 14(5) ICCPR in its views in relation to the fairness of appellate proceedings. However, it has not limited its assessment entirely to this provision, but has resorted to Article 14(1) and 14(3) ICCPR in certain situations too. These legal bases will, accordingly, be assessed separately.

2.1. Article 14(1) ICCPR

The first paragraph of Article 14(1) contains three distinct guarantees. It mandates that: (i) "[a]ll persons shall be equal before the courts and tribunals"; (ii) "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"; and (iii) "[t]he press and the public may be excluded from all or part of a trial […] but any judgment rendered in a criminal case […] shall be made public […]".

2.1.1. Equality

The HRC has found that "[t]he right to equality before courts and tribunals, in general terms, guarantees […] equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination".[642]

Considering that "[t]he right of equal access to a court […] does not address the issue of the right to appeal",[643] the HRC has mainly considered "equality of arms" in connection with appellate proceedings. This aspect of the right to equality "means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant".[644] Thus, the exclusion of defendants from appellate hearings, whilst the prosecution is permitted to attend, contravenes equal treatment.[645]

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[642] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 8.
[643] Ibid., at 12.
[644] Ibid., at 12.
[645] Views, *Dudko v. Australia*, Communication No. 1347/2005, HRC, 23 July 2007, at 7.3-7.4; Views, *Quliyev v. Azerbaijan*, Communication No. 1972/2010, HRC, 16 October 2014, at 9.3. Similar: Views, *Aliev v. Ukraine*, Communication No. 781/1997, HRC, 7 August 2003, at 7.3.

2.1.2. Public Hearing

According to the HRC, "[a]ll trials […] must in principle be conducted orally and publicly", although this requirement "does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations".[646] On this basis, it has found that "the absence of oral hearings in the appellate proceedings […] [raises] no issue under article 14" ICCPR,[647] provided that the tribunal "can look at the factual dimensions of the case".[648]

However, oral hearings on appeal have been required in particular circumstances. For instance, an appellate court had admitted that a first instance judge ought to have been disqualified, but ruled, on the basis of a review of the written evidence, that the verdict had not been affected by the judge's participation. In this regard, the HRC held that only oral proceedings "would have enabled the Court [of Appeal] to proceed with the reevaluation of all the evidence submitted by the parties".[649] Pursuant to this precedent, and in conjunction with a reference to the corresponding jurisprudence of the ECtHR, the HRC has considered that, as an appellate court "had to examine the case as to the facts and the law, and in particular had to make a full assessment of the question of the author's guilt or innocence, it should have used its power to conduct hearings" when imposing additional convictions.[650]

2.1.3. Impartial Tribunal

Impartiality entails that "judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other" and that "the tribunal must also appear to a reasonable observer to be impartial".[651]

In respect of appellate proceedings, the HRC's views have, based on Article 14(1) ICCPR, mainly focused on the involvement of the same judges in the appellate process and the preceding stages of a criminal trial. For instance, the participation of two appellate judges in

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[646] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 28.
[647] Views, *R.M. v. Finland*, Communication No. 301/1988, HRC, 23 March 1989, at 6.4. Also: Views, *Jessop v. New Zealand*, Communication No. 1758/2008, HRC, 29 March 2011, at 8.7.
[648] Views, *Gbondo Sama v. Germany*, Communication No. 1771/2008, HRC, 28 July 2009, at 6.8.
[649] Views, *Karttunen v. Finland*, Communication No. 387/1989, HRC, 23 October 1992, at 7.3.
[650] Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 7.8 (footnote 55), referring to: Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 33.
[651] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 21.

preliminary proceedings, which "was such as to allow them to form an opinion on the case prior to the […] appeal proceedings" and which was "necessarily related to the charges against the author and the evaluation of those charges", has been deemed incompatible with the impartiality requirement.[652] However, the involvement of a judge in, on the one hand, an appeal involving the quashing of an acquittal and ordering a retrial and, on the other hand, the appeal instituted by the author after he had been convicted on retrial, is not contrary to this exigence. In this regard, the HRC noted that "the subject matter of the author's cassation appeal should have related only to his second retrial by the jury, and not to the decision […] quashing his acquittal" and, therefore, "the author's cassation appeal de jure does not affect the decision […] quashing his acquittal.[653]

2.2. Article 14(3) ICCPR

Supplementing the general safeguards contained in Article 14(1) ICCPR, Article 14(3) ICCPR applies specifically to criminal proceedings. This provision lays down several "minimum guarantees", to which "everyone shall be entitled […], in full equality". In the context of appellate proceedings, the HRC has mainly assessed issues pertaining to legal assistance, which have been enshrined in Article 14(3)(b) and 14(3)(d) ICCPR, and, to a more limited extent, the rights set forth in Article 14(3)(a) and (d) ICCPR.

2.2.1. Article 14(3)(a) ICCPR

Article 14(3)(a) ICCPR lays down the right "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". In relation to an aggravation of a first instance conviction on appeal, the HRC concluded that no violation had been committed, since the basis of the author's aggravated conviction had been included in the charges levelled against him and this conviction was subsequently reviewed

[652] Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 7.9. One member of the HRC dissented, holding that "many legal systems provide for preliminary proceedings in criminal cases, in which a defendant may contest issues concerning arrest, probable cause, and the rendering of charges for trial. The idea of prejudice in a judge usually refers to some extraneous matter that might bias him against a particular party. It does not refer to his review of the case in prior proceedings. Indeed, some court systems choose to assign any related criminal cases to the same judge, in order to benefit by the judge's familiarity with the issues. It would be radical, indeed, to suggest that because a judge had passed on an issue of bail or remand, or the adequacy of an indictment, that he was thereafter barred from any further participation in the case. There is no suggestion of why, in this particular case, there was any prejudice formed from the earlier judgments undertaken in prior professional review". See: Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, Individual Opinion by Committee Member Ms. Ruth Wedgwood.

[653] Views, *Babkin v. Russian Federation*, Communication No. 1310/2004, HRC, 3 April 2008, at 13.3.

by a third instance.[654] Even though the HRC did not specify the legal basis, it is implicit in this consideration that the aggravation of a conviction on appeal, pursuant to an aspect extrinsic to the original charge, and without the possibility of further appellate review, contravenes paragraphs 3(a) and (5) of Article 14 ICCPR.

2.2.2. Article 14(3)(b) ICCPR

The HRC has applied the right to "have adequate time and facilities for the preparation of his defence"[655] in connection with the information provided to the person concerned as to the date of consideration of his appeal. In this respect, it concluded that, "although not effectively informing him of the date […], the State party did not deprive him of the right to apply for the postponement of the hearing", which meant that no violation could be established.[656]

In relation to the right "to communicate with counsel of his own choosing", the HRC held that "[a] State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice".[657] It, indeed, found violations of the right to effective legal assistance on appeal on several occasions and, in particular, where counsel failed to put forward appellate arguments and/or conceded that there is no merit in the appeal.[658] However, the legal basis for the views of the HRC has fluctuated considerably. It has mainly found violations of Article 14(3)(b) ICCPR and Article 14(d) ICCPR taken together,[659] but it has also found a violation of Article 14(3)(d) ICCPR in conjunction with a rejection of the need to consider Article 14(3)(b) ICCPR.[660] Moreover, it has also found a breach of Article 14(3)(b) ICCPR combined with Article 14(5) ICCPR.[661]

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[654] Views, *Kulomin v. Hungary*, Communication No. 521/1992, HRC, 22 March 1996, at 11.7.
[655] Also: Part II, Chapter 2.3.7.
[656] Views, *Babkin v. Russian Federation*, Communication No. 1310/2004, HRC, 3 April 2008, at 13.4.
[657] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 32.
[658] Views, *Graham & Morrison v. Jamaica*, Communication No. 461/1991, HRC, 25 March 1996, at 10.5; Views, *Steadman v. Jamaica*, Communication No. 528/1993, HRC, 2 April 1997, at 10.3; Views, *McLeod v. Jamaica*, Communication No. 734/1997, HRC, 3 June 1998, at 6.3; Views, *Daley v. Jamaica*, Communication No. 750/1997, HRC, 3 August 1998, at 7.5; Views, *Burrell v. Jamaica*, Communication No. 546/1993, HRC, 18 July 1996, at 9.3.
[659] Views, *Graham & Morrison v. Jamaica*, Communication No. 461/1991, HRC, 25 March 1996, at 10.5; Views, *Steadman v. Jamaica*, Communication No. 528/1993, HRC, 2 April 1997, at 10.3; Views, *McLeod v. Jamaica*, Communication No. 734/1997, HRC, 3 June 1998, at 6.3.
[660] Views, *Daley v. Jamaica*, Communication No. 750/1997, HRC, 3 August 1998, at 7.5.
[661] Views, *Burrell v. Jamaica*, Communication No. 546/1993, HRC, 18 July 1996, at 9.3.

2.2.3. Article 14(3)(d) ICCPR

Paragraph (d) of Article 14 ICCPR is a multi-faceted provision. It concerns the right "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

Although the HRC predominantly dealt with the presence of the accused under Article 14(1) ICCPR,[662] it has also invoked Article 14(3)(d) ICCPR. In this regard, it found that this provision was applicable "as the court examined the case as to the facts and the law and made a new assessment of the issue of guilt or innocence".[663] It considered, furthermore, that it "requires that accused persons are entitled to be present during their trial and that proceedings in the absence of the accused are only permissible if this is in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present".[664] In addition, the HRC took into account that the person concerned "did not have the opportunity to consult with his lawyer regarding the submissions that the prosecutor made".[665]

Turning to "the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right",[666] several issues have arisen in the views of the HRC. For instance, regarding the conduct of an appellate hearing in the absence of both the accused and his counsel, the HRC found violations of Article 14(3)(d) ICCPR in isolation[667] or in conjunction with Article 14(5) ICCPR.[668] This guarantee further implies that the defendant must be informed of his right to request the presence of his lawyer during appellate hearings.[669] Furthermore, where an accused's request for counsel to be replaced is denied, a violation of Article 14(3)(d) ICCPR may ensue if

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[662] Part II, Chapter 2.1.1. Also: HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 36.
[663] Views, *Dorofeev v. Russia*, Communication No. 2041/2011, HRC, 11 July 2014, at 10.6.
[664] Ibid.
[665] Ibid.
[666] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 37.
[667] Views, *Aliev v. Ukraine*, Communication No. 781/1997, HRC, 7 August 2003, at 7.3.
[668] Views, *Lumley v. Jamaica*, Communication No. 662/1995, HRC, 31 March 1999, at 7.4.
[669] Views, *Y.M. v. Russia*, Communication No. 2059/2011, HRC, 31 March 2016, at 9.7.

insufficient justification is provided "why it was necessary for the administration of justice to restrict the author's right to replace the lawyer or why it was not possible to assign a public defender to him".[670] Finally, as highlighted in respect of Article 14(3)(b) ICCPR, ineffective assistance by counsel on appeal may also engender a violation of Article 14(3)(d) ICCPR.[671] However, the HRC has found separate violations of Article 14(3)(d) ICCPR in these circumstances as well.[672] Pursuant to a combined assessment of, on the one hand, Article 14(3)(d) ICCPR and, on the other hand, Article 14(3)(b) and/or Article 14(5) ICCPR, it has further clarified that no ineffective assistance is provided when: counsel abandons one or several grounds of appeal in the exercise of professional judgment;[673] legal aid counsel fails to seek instructions from the client in relation to the appeal;[674] or issues that have not been raised by counsel at trial cannot be raised anew on appeal according to domestic law.[675]

Under "the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it",[676] the HRC has considered that "[a] denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes […] a violation" of this provision.[677] This interpretation extends to additional instances of appellate review too.[678] However, this right is not limited to capital punishment cases, but applies to other types of criminal proceedings as well.[679] The HRC has further established that a limitation of this right on the basis of the prospect of success on appeal may be justified.[680]

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[670] Ibid., at 9.5.
[671] Part II, Chapter 2.2.2.
[672] Views, *Little v. Jamaica*, Communication No. 283/1988, HRC, 1 November 1991, at 8.4; Views, *Campbell v. Jamaica*, Communication No. 248/1987, HRC, 30 March 1992, at 6.6; Views, *Collins v. Jamaica*, Communication No. 356/1989, HRC, 25 March 1993, at 8.2; Views, *Jones v. Jamaica*, Communication No. 585/1994, HRC, 25 May 1998, at 9.5; Views, *Morrison v. Jamaica*, Communication No. 663/1995, HRC, 25 November 1998, at 8.6.
[673] Views, *Marshall v. Jamaica*, Communication No. 730/1996, HRC, 3 November 1998, at 6.5; Views, *Bailey v. Jamaica*, Communication No. 709/1996, HRC, 21 July 1999, at 7.2.
[674] Views, *Teesdale v. Trinidad & Tobago*, Communication No. 677/1996, HRC, 1 April 2002, at 9.7.
[675] Views, *Berry v. Jamaica*, Communication No. 330/1988, HRC, 26 April 1994, at 11.6.
[676] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 38.
[677] Ibid., at 51.
[678] Views, *LaVende v. Trinidad & Tobago*, Communication No. 554/1993, HRC, 29 October 1997, at 5.8.
[679] Views, *Z.P. v. Canada*, Communication No. 341/1988, HRC, 11 April 1991, at 2.3-2.5, 5.4.
[680] Ibid., at 4.4, 5.4.

2.2.4. Article 14(3)(e) ICCPR

Article 14(3)(e) ICCPR, which enshrines the accused person's right "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", is more limited than meets the eye. In general, it does not "provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings".[681]

Whilst this right may have some relevance to appellate proceedings, the HRC's views are not entirely clear in this respect. For instance, it has neglected to explicate how the refusal of a court of first instance to order expert testimony of crucial importance constitutes a simultaneous violation of Articles 14(3)(e) and 14(5) ICCPR, in view of the fact that the author had complained about the delays affecting the appellate process, as a result of which he was forced to abandon the appeal.[682] Moreover, it has, in a conclusory manner, stated that the impossibility of examining witnesses on appeal does not infringe Article 14(3)(e) ICCPR, since the author indicated that he did not desire to call witnesses in his leave to appeal.[683]

2.3. Article 14(5) ICCPR

The HRC has identified several issues encompassed by Article 14(5) ICCPR, which may be categorised as follows: (i) the extension of the right to appeal to convicted persons;[684] (ii) the obligation to ensure appellate review, as such;[685] (iii) the modalities of appellate review;[686] (iv) the provision of (additional) appellate review when an acquittal pronounced by a lower instance is succeeded by an appellate conviction;[687] (v) the provision of (further) appellate review when a person is directly brought before the highest domestic court;[688] (vi) the scope of appellate review;[689] (vii) the effective exercise of the right to appeal;[690] and (viii) legal

[681] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 39.
[682] Views, *García Fuenzalida v. Ecuador*, Communication No. 480/1991, HRC, 12 July 1996, at 3.6, 9.5.
[683] Views, *Lumley v. Jamaica*, Communication No. 662/1995, HRC, 31 March 1999, at 7.2.
[684] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 45.
[685] Ibid., at 45-46, 50.
[686] Ibid., at 45.
[687] Ibid., at 47.
[688] Ibid., at 47.
[689] Ibid., at 48.
[690] Ibid., at 49.

assistance on appeal.[691] Moreover, in its views, the HRC has, on this basis, also assessed the rights to a reasoned opinion by an appellate court and to be present at appellate hearings.[692]

2.3.1. Convicted Persons

Due to the reference to "convicted" in Article 14(5) ICCPR, the HRC has inescapably rejected a communication alleging a violation of Article 14(5) ICCPR in respect of first instance proceedings resulting in acquittal.[693]

The wording of Article 14(5) ICCPR may suggest that appellate review in criminal matters is an obligatory affair, considering that it states that everyone convicted on criminal charges "shall" have such a right. However, the views of the HRC have established otherwise. For instance, when one insists upon being tried in first instance before the highest domestic court, even though the regular avenue would have a guaranteed a right of appeal, this right has been considered forfeited.[694] A similar conclusion is implied in the findings that the right to appeal had not been violated where counsel had not initiated an appeal after informing the person concerned that there were no appealable grounds[695] or where the right to appeal had been withdrawn on the basis of seemingly dubious advice by counsel[696].

2.3.2. Availability of Appellate Review

The plain absence of a higher instance constitutes, of course, the emblematical violation of Article 14(5) ICCPR. For instance, in one of its first views on the right to appeal, the exclusion by law of the possibility of review of a criminal conviction imposed by a military court was deemed a transgression of Article 14(5) ICCPR.[697] Only one State Party to the ICCPR appears to have made a general reservation to this provision.[698]

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[691] Ibid., at 51.
[692] Also: Part II, Chapter 2.1.1; Part II, Chapter 2.2.3.
[693] Views, *L.N.P. v. Argentina*, Communication No. 1610/2007, HRC, 18 July 2011, at 12.4.
[694] Views, *Pascual Estevill v. Spain*, Communication No. 1004/2001, HRC, 25 March 2003, at 6.2.
[695] Views, *Robinson v. Jamaica*, Communication No. 731/1996, HRC, 29 March 2000, at 10.5-10.6.
[696] Views, *Devgan v. Canada*, Communication No. 948/2000, HRC, 30 October 2000, at 2.2-2.3, 4.2.
[697] Views, *Salgar de Montejo v. Colombia*, Communication No. 64/1979, HRC, 24 March 1982, at 9, 11.
[698] Trinidad and Tobago ("The Government of the Republic of Trinidad and Tobago reserves the right not to apply paragraph 5 of article 14 in view of the fact that section 43 of its Supreme Court of Judicature Act No. 12 of 1962 does not confer on a person convicted on indictment an unqualified right of appeal and that in particular cases, appeal to the Court of Appeal can only be done with the leave of the Court of Appeal itself or of the Privy Council"). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#35.

In addition, when domestic law excludes regular appellate review of a conviction by a higher court, but allows for alternative remedies, the HRC has assessed whether the latter may be characterised as an "appeal" for the purposes of Article 14(5) ICCPR. For instance, "[a] system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5 [ICCPR], regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor".[699] Initially, the HRC had rejected such remedies as they were considered of an extraordinary character and their application was dependent on the exercise of discretionary powers by judicial officials.[700] Subsequently, the HRC emphasised that such review "only applies to already executory decisions and thus constitutes an extraordinary means of appeal which is dependent on the discretionary power of judge or prosecutor".[701] Furthermore, whereas Article 14(5) ICCPR does not extend to post-conviction remedies,[702] the possibility of applying for review on the basis of new evidence is also an inadequate substitute for an appeal in the event that regular appellate review is not available. According to the HRC, "[t]he possibility of applying to a Court to review a conviction on the basis of new evidence is by definition something other than a review of an existing conviction, as an existing conviction is based on evidence which existed at the time it was handed down".[703]

Moreover, the HRC clarified that a multi-level appeal was not foreseen by the drafters of the ICCPR. Article 14(5) ICCPR "does not require States parties to provide for several instances of appeal".[704] Thus, a summary dismissal of an appeal, instituted after a first instance conviction had been affirmed by an appellate court, was not considered a violation.[705] This does not detract from the fact that, if domestic law allows for multi-level appellate review, effective access must be provided under Article 14(5) ICCPR.[706]

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[699] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 50.
[700] Views, *Gelazauskas v. Lithuania*, Communication No. 836/1998, HRC, 17 March 2003, at 7.2, 7.6; Views, *Saidova v. Tajikistan*, Communication No. 964/2001, HRC, 8 July 2004, at 6.5; Views, *Ratiani v. Georgia*, Communication No. 975/2001, HRC, 21 July 2005, at 11.2.
[701] Views, *Bandajevsky v. Belarus*, Communication No. 1100/2002, HRC, 28 March 2006, at 10.13; Views, *Kovalev v. Belarus*, Communication No. 2120/2011, HRC, 29 October 2012, at 11.6.
[702] Views, *Litvin v. Ukraine*, Communication No. 1535, HRC, 19 July 2011, at 9.4; Views, *Minogue v. Australia*, Communication No. 954/2000, HRC, 2 November 2004, at 2.2, 6.4.
[703] Views, *Ratiani v. Georgia*, Communication No. 975/2001, HRC, 21 July 2005, at 11.3.
[704] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 45.
[705] Views, *Rouse v. the Philippines*, Communication No. 1089/2002, HRC, 25 July 2005, at 2.20, 2.21, 7.6.
[706] Part II, Chapter 2.3.7.

2.3.3. Modalities of Appellate Review

According to the HRC, the expression "according to law" in Article 14(5) ICCPR "is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognised by the […] [ICCPR], and not merely by domestic law".[707] In connection with the preceding discussion on the availability of higher review,[708] it, thus, rejected the interpretation that these words leave "it to national law to determine in which cases […] application may be made to a court of higher instance".[709] This term "rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review".[710]

Furthermore, the HRC has found, in the context of the possibility of restricting rights contained in the ICCPR on the basis of domestic law, that "a norm, to be characterized as a 'law', must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public".[711] Since Article 14(5) ICCPR refers to "law" and appellate modalities may similarly entail a restriction of (aspects of) the accused's right to appeal, the requirements of sufficient precision and foreseeability must be complied with in the regulation of appellate proceedings too.

2.3.4. Appellate Conviction Revoking Acquittal

According to the HRC, "[a]rticle 14, paragraph 5 [ICCPR] is violated […] where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court."[712] The rationale underlying this approach is that Article 14(5) ICCPR "not only guarantees that the judgement will be placed before a higher court […] but also that the conviction will undergo a second review".[713] It subsequently noted that, "[a]lthough a person acquitted at first instance may be

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[707] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 45.
[708] Part II, Chapter 2.3.2.
[709] Views, *Salgar de Montejo v. Colombia*, Communication No. 64/1979, HRC, 24 March 1982, at 3.2.
[710] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 45.
[711] Ibid., at 25. Also: HRC, *General Comment 35, Article 9 (Liberty and Security of Person)*, CCPR/C/GC/35, 16 December 2014, at 22; HRC, *General Comment No. 27, Freedom of Movement (Article 12)*, CCPR/C/21/Rev.1/Add.9, 1 November 1999, at 13.
[712] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 47. Also: M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl: N.P. Engel Verlag, 2005), at 351.
[713] Views, *Gomaríz Valera v. Spain*, Communication No. 1095/2002, HRC, 22 July 2005, at 7.1.

convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court".[714]

At the same time, the appellate affirmation of an inferior conviction, accompanied by increased sentences, has not necessarily given rise to violations of Article 14(5) ICCPR on this basis. According to the HRC, many domestic legal systems allow appeal courts "to lower, confirm, or increase the penalties imposed by the lower courts" and the finding of the second instance "did not change the essential characterization of the offence but merely reflected […] [its] assessment that the seriousness of the circumstances of the offence merited a higher penalty".[715] Likewise, the appellate aggravation of a sentence, on account of the first instance having "miscalculated the number of years of imprisonment applicable to an offence committed with aggravating circumstances", was permitted for largely the same reasons.[716]

However, several States have made reservations to Article 14(5) ICCPR, which stipulate that it neither conflicts with internal regulations allowing for the substitution of an acquittal for an appellate conviction nor the appellate increase of a sentence without a further appeal.[717]

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[714] Ibid., at 7.1. Also: Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 2.9-2.10; Views, *Conde v. Spain*, Communication No. 1325/2004, HRC, 31 October 2006, at 2.3, 2.5, 7.2; Views, *Calderón Bruges v. Colombia*, Communication No. 1641/2007, HRC, 23 March 2012, at 7.3.
[715] Views, *Pérez Escolar v. Spain*, Communication No. 1156/2003, HRC, 28 March 2006, at 9.2.
[716] Views, *J.A.B.G. v. Spain*, Communication No. 1891/2009, HRC, 29 October 2012, at 2.6, 8.5.
[717] Austria ("[P]aragraph 5 [of Article 14 ICCPR]is not in conflict with legal regulations which stipulate that after an acquittal or a lighter sentence passed by a court of the first instance, a higher tribunal may pronounce conviction or a heavier sentence for the same offence, while they exclude the convicted person's right to have such conviction or heavier sentence reviewed by a still higher tribunal"); Belgium ("Paragraph 5 of … article [14 ICCPR] shall not apply to persons who, under Belgian law, are convicted and sentenced at second instance following an appeal against their acquittal of first instance); Denmark ("A right to a further appeal does not have to be instituted in cases where the accused person, having been acquitted by a lower court, is convicted for the first time by a higher court hearing an appeal of the acquittal"); Germany ("A further appeal does not have to be instituted in all cases solely on the grounds the accused person having been acquitted by the lower court-was convicted for the first time in the proceedings concerned by the appellate court [sic]"); Luxemburg ("The Government of Luxembourg declares that it is implementing article 14, paragraph 5 [ICCPR], since that paragraph does not conflict with the relevant Luxembourg legal statutes, which provide that, following an acquittal or a conviction by a court of first instance, a higher tribunal may deliver a sentence, confirm the sentence passed or impose a harsher penalty for the same crime. However, the tribunal's decision does not give the person declared guilty on appeal the right to appeal that conviction to a higher appellate jurisdiction"); Norway ("[The Government of Norway declares that] the entry into force of an amendment to the Criminal Procedure Act, which introduces the right to have a conviction reviewed by a higher court in all cases, the reservation made by the Kingdom of Norway with respect to article 14, paragraph 5 of the … [ICCPR] shall continue to apply only in the following exceptional circumstances: … If the appellate court convicting the defendant is the Supreme Court, the conviction may not be appealed whatsoever"). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#35.

2.3.5. First Instance Trial before Highest Court

The HRC has also determined that a trial by the highest court sitting in first instance is incompatible with Article 14(5) ICCPR. Such proceedings are usually reserved for high-ranking public officials,[718] but may affect others as well, such as when their cases are connected to those who, on account of their office, are subject to such constructions.[719] According to the HRC, "the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned".[720] More specifically, it has either found that the very existence of the right to appeal may not be left to the discretion of States Parties[721] or that there is an obligation to provide appellate review even in the absence of a system of automatic appeal.[722] Various States have made reservations to Article 14(5) ICCPR to allow for first instance trials conducted by their highest courts.[723]

2.3.6. Scope of Appellate Review

As to the scope of review required under Article 14(5) ICCPR, two issues arise. First, this provision requires superior review of "conviction and sentence". In addition, in the views of the HRC, it has been clarified that appellate review must encompass legal and factual matters.

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[718] E.g., Views, *Terrón v. Spain*, Communication No. 1073/2002, HRC, 5 November 2004, at 7.4.
[719] E.g., Views, *Fanali v. Italy*, Communication No. 75/1980, HRC, 31 March 1983, at 11.8; Views, *Oliveró Capellades v. Spain*, Communication No. 1211/2003, HRC, 11 July 2006, at 7.
[720] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 47.
[721] Views, *Terrón v. Spain*, Communication No. 1073/2002, HRC, 5 November 2004, at 7.4; Views, *Oliveró Capellades v. Spain*, Communication No. 1211/2003, HRC, 11 July 2006, at 7; Views, *Serena & Rodríguez v. Spain*, Communications Nos. 1351/2005 and 1352/2005, HRC, 8 March 2006, at 9.3. Also: Part II, Chapter 2.3.2; Part II, Chapter 2.3.3.
[722] Views, *Khalilova v. Tajikistan*, Communication No. 973/2001, HRC, 30 March 2005, at 7.5; Views, *Aliboeva v. Tajikistan*, Communication No. 985/2001, HRC, 18 October 2005, at 6.5.
[723] Belgium ("Paragraph 5 of … article [14 ICCPR] shall not apply to persons … who, under Belgian law, are brought directly before a higher tribunal such as the Court of Cassation, the Appeals Court or the Assize Court"); Denmark ("A right to appeal does not have to be instituted in criminal proceedings against a Member of Government or any other person brought before the High Court of the Realm (Rigsretten)"); Luxemburg ("The Government of Luxembourg further declares that article 14, paragraph 5 [ICCPR], shall not apply to persons who, under Luxembourg law, are remanded directly to a higher court or brought before the Assize Court"); the Netherlands ("The Kingdom of the Netherlands reserves the statutory power of the Supreme Court of the Netherlands to have sole jurisdiction to try certain categories of persons charged with serious offences committed in the discharge of a public office"); Norway ("[The Government of Norway declares that] the entry into force of an amendment to the Criminal Procedure Act, which introduces the right to have a conviction reviewed by a higher court in all cases, the reservation made by the Kingdom of Norway with respect to article 14, paragraph 5 of the … [ICCPR] shall continue to apply only in the following exceptional circumstances: … According to article 86 of the Norwegian Constitution, a special court shall be convened in criminal cases against members of the Government, the Storting (Parliament) or the Supreme Court, with no right of appeal"). In 2005, Italy withdrew its reservation to Article 14(5) ICCPR in respect of one-level "proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers". Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#35. The HRC previously condoned such convictions in the Italian context. See: Views, *Fanali v. Italy*, Communication No. 75/1980, HRC, 31 March 1983, at 11-6-11.8.

2.3.6.1. Conviction and Sentence

The HRC has found that appellate review of both the conviction and sentence is not obligatory. Thus, more limited appellate review, performed by two instances on three occasions, did not violate Article 14(5) ICCPR, as the author had appealed the judgment "only in respect of the sentence imposed" and the totality of the reviews was satisfactory.[724]

2.3.6.2. Evidence and Law

The HRC has considered, in general, that this provision imposes "a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case".[725] It has further clarified that "[a] review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient", but article 14, paragraph 5 [ICCPR] does not require a full retrial or a 'hearing', as long as the tribunal carrying out the review can look at the factual dimensions of the case".[726] It continued to note that, "for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the […] [ICCPR] is not violated".[727] This statement extends to leave to appeal proceedings too, which do not necessarily violate Article 14(5) ICCPR, as long as the appellate review provided in such proceedings is of sufficient scope.[728]

Nonetheless, the practical application of these facets of the scope of appellate review required by Article 14(5) ICCPR has not proved undemanding. The HRC has, indeed, dismissed appellate procedures explicitly confined to matters of law as irreconcilable with Article 14(5)

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[724] Views, *Bryhn v. Norway*, Communication No. 789/1997, HRC, 29 October 1999, at 2.3, 7.2.
[725] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 48.
[726] Ibid., at 48. E.g., Views, *Romanov v. Ukraine*, Communication No. 842/1998, HRC, 30 October 2003, at 6.5; Views, *Korolko v. Russian Federation*, Communication No. 1344/2005, HRC, 25 October 2010, at 6.6; Views, *Sevostyanov v. Russia*, Communication No. 1856/2008, HRC, 1 November 2013, at 7.3.
[727] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 48.
[728] Views, *Lumley v. Jamaica*, Communication No. 662/1995, HRC, 31 March 1999, at 7.3; Views, *Rogerson v. Australia*, Communication No. 802/1998, HRC, 3 April 2002, at 7.5; Views, *Juma v. Australia*, Communication No. 984/2001, HRC, 28 July 2003, at 7.5. Implicit in: Views, *Lovell v. Australia*, Communication No. 920/2000, HRC, 24 March 2003, at 8.4.

ICCPR on various occasions.[729] It has, however, also taken care to consider whether appellate courts have, in reality, considered matters of fact, despite jurisdiction ostensibly limited to matters of law. If so, it has considered such review to comply with Article 14(5) ICCPR.[730] Be that as it may, the line between appellate review of sufficient and insufficient scope appears thin, as demonstrated by the HRC's views concerning the Spanish appellate system.

In a watershed communication, alleging that the second instance had rejected the application for judicial review on the basis that "evidence has to be evaluated exclusively by the court ad quo" and "re-evaluating the evidence [on appeal] […] is […] not admissible",[731] the HRC concluded that "the lack of any possibility of fully reviewing the author's conviction and sentence […] means that the guarantees provided for in article 14, paragraph 5, […] [ICCPR] have not been met".[732] In ensuing communications, it has confirmed the incompatibility of a complete exclusion of factual matters with Article 14(5) ICCPR[733] and it has further specified that appellate review limited to an examination as to whether the inferior decision amounts to arbitrariness or denial of justice does not satisfy the requirements of this provision either.[734]

Thereafter, however, the HRC abandoned this line of views in respect of the Spanish appellate system. In what would be the first in a string of comparable views, it found that the scope of the appellate review complied with Article 14(5) ICCPR, as the second and third instance had "thoroughly addressed the author's allegation that circumstantial evidence was insufficient to convict him".[735] Numerous views rejecting such complaints either as inadmissible or congruent with Article 14(5) ICCPR ensued, as the HRC found that, in actual fact, the appellate review extended beyond a mere examination of matters of law.[736] Nonetheless, it

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[729] Views, *Domukovsky et al. v. Georgia*, Communications Nos. 623/1995, 624/1995, 626/1995 & 627/1995, HRC, 6 April 1998, at 18.11; Views, *Saidova v. Tajikistan*, Communication No. 964/2001, HRC, 8 July 2004, at 6.5; Views, *Bandajevsky v. Belarus*, Communication No. 1100/2002, HRC, 28 March 2006, at 10.13; Views, *Kovalev v Belarus*, Communication No. 2120/2011, HRC, 29 October 2012, at 11.6.
[730] Views, *Perera v. Australia*, Communication No. 536/1993, HRC, 28 March 1995, at 6.4; Views, *Werenbeck v. Australia*, Communication No. 579/1994, HRC, 27 March 1997, at 9.10; Views, *Judge v. Canada*, Communication No. 829/1998, HRC, 5 August 2003, at 7.7; Views, *Weiss v. Austria*, Communication No. 1086/2002, HRC, 3 April 2003, at 9.3.
[731] Views, *Gómez Vázquez v. Spain*, Communication No. 701/1996, HRC, 20 July 2000, at 3.2.
[732] Ibid., at 11.1.
[733] Views, *Semey v. Spain*, Communication No. 986/2001, HRC, 30 July 2003, at 9.1; Views, S*ineiro Fernández v. Spain*, Communication No. 1007/2001, HRC, 7 August 2003, at 7.
[734] Views, *Alba Cabriada v. Spain*, Communication No. 1101/2002, HRC, 1 November 2004, at 7.2–7.3; Views, *Martínez Fernández v. Spain*, Communication No. 1104/2002, HRC, 29 March 2005, at 7.
[735] Views, *Parra Corral v. Spain*, Communication No. 1356/2005, HRC, 29 March 2005, at 4.3.
[736] Views, *Cuartero Casado v. Spain*, Communication No. 1399/2005, HRC, 25 July 2005, at 4.4; Views, *Carvallo Villar v. Spain*, Communication No. 1059/2002, HRC, 28 October 2005, at 9.5; Views, *Herrera Sousa*

continued to find sporadic violations of Article 14(5) ICCPR too. Constitutional review was not considered an appropriate remedy in relation to trials by the highest court sitting in first instance.[737] In addition, certain specific instances of second instance review have also been deemed of insufficient scope.[738] According to the HRC, Spanish cassation review is, in general, "not a substitute for an appeal before a court of second instance, although, in certain particular cases, an appeal in cassation might include a reconsideration of the trial court's decisions that […] [is] sufficient to meet the requirements of the" ICCPR.[739]

The HRC's assessment of the scope of appellate review under Article 14(5) ICCPR is not exclusively informed by the legal modalities in place, however. The conduct of the parties has been taken into account too. For instance, the fact that counsel had failed to initiate regular appellate proceedings, leading to automatic appellate review of more limited scope, did not lead to an admissible claim under Article 14(5) ICCPR.[740] In addition, a party instituting

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v Spain, Communication No. 1094/2002, HRC, 27 March 2006, at 6.3; Views, *Johnson v. Spain*, Communication No. 1102/2002, HRC, 27 March 2006, at 6.6; Views, *Pérez Escolar v. Spain*, Communication No. 1156/2003, HRC, 28 March 2006, at 9.3; Views, *De Dios Prieto v. Spain*, Communication No. 1293/2004, HRC, 25 July 2006, at 6.4; Views, *García González v. Spain*, Communication No. 1441/2005, HRC, 25 July 2006, at 4.3; Views, *Oubiña Piñeiro v. Spain*, Communication No. 1387/2005, HRC, 25 July 2006, at 6.2; Views, *Amador Amador & Amador Amador v. Spain*, Communication No. 1181/2003, HRC, 31 October 2006, at 9.2; Views, *Villamon Ventura v. Spain*, Communication No. 1305/2004, HRC, 31 October 2006, at 6.6; Views, *Conde Conde v. Spain*, Communication No. 1325/2004, HRC, 31 October 2006, at 6.4; Views, *Guardiola Martínez v. Spain*, Communication No. 1098/2002, HRC, 31 October 2006, at 6.8; Views, *Gonzalez Roche & Munoz Hernandez v. Spain*, Communication No. 1370/2005, HRC, 24 July 2007, at 6.6; Views, *Gueorguiev v. Spain*, Communication No. 1386/2005, HRC, 24 July 2007, at 6.6; Views, *Rodrigo Alonso v. Spain*, Communication No. 1391/2005, HRC, 24 July 2007, at 6.6; Views, *Subero Beisti v. Spain*, Communication No. 1375/2005, HRC, 1 April 2008, at 6.4; Views, *Rodríguez Rodríguez v. Spain*, Communication No. 1489/2006, HRC, 30 October 2008, at 6.4; Views, *Pindado Martínez v. Spain*, Communication No. 1490/2006, HRC, 30 October 2008, at 6.5; Views, *De Leon Castro v. Spain*, Communication No. 1388/2005, HRC, 19 March 2009, at 9.2; Views, *Piscioneri v. Spain*, Communication No. 1366/2005, HRC, 22 July 2009, at 9.2; Views, *Rodriguez Dominguez & Neira Fernandez v. Spain*, Communication No. 1471/2006, HRC, 23 November 2009, at 6.4; Views, *Suils Ramonet v. Spain*, Communication No. 1555/2007, HRC, 27 October 2009, at 6.4; Views, *Alfonso Sanjuán &-Rafael Blázquez v. Spain*, Communication No. 1869/2009, HRC, 26 July 2010, at 6.3; Views, *L.G.M. v. Spain*, Communication No. 1617/2007, HRC, 26 July 2011, at 6.5; Views, *J.A.B.G. v. Spain*, Communication No. 1891/2009, HRC, 29 October 2012, at 8.5; Views, *J.J.U.B. v. Spain*, Communication No. 1892/2009, HRC, 29 October 2012, at 7.5; Views, *H.P.N. v. Spain*, Communication No. 1943/2010, HRC, 25 March 2013, at 7.7; Views, *M.R.R. v. Spain*, Communication No. 2037/2011, HRC, 21 July 2014, at 4.2; Views, *S.S.F., S.S.E., & E.J.S.E v. Spain*, Communication No. 2105/2011, HRC, 28 October 2014, at 8.5.

[737] Views, *Hens Serena & Corujo Rodriguez v. Spain*, Communications Nos. 1351-1352/2005, 25 March 2008, at 9.3. Implicit in: Views, *Oliveró Capellades v. Spain*, Communication No. 1211/2003, HRC, 11 July 2006, at 2.3, 7.

[738] Views, *Gayoso Martínez v. Spain*, Communication No. 1363/2005, HRC, 19 October 2009, at 9.3. Similar: Views, *Carpintero Uclés v. Spain*, Communication No. 1364/2005, HRC, 22 July 2009, at 11.2-11.3.

[739] Views, *Possemiers v. Spain*, Communication No. 1398/2005, HRC, 20 October 2009, at 6.4.

[740] Views, *Kurbanova v. Tajikistan*, Communication No 1096/2002, HRC, 6 November 2003, at 6.7.

appeal without explicitly seeking full review did not have an admissible claim under Article 14(5) ICCPR on account of the alleged limited scope of review.[741]

2.3.7. Effective Exercise of the Right to Appeal

As to the effective exercise of the right to appeal, the HRC has, in general, emphasised the availability of relevant documents enabling recourse to a higher judicial instance. In this respect, it has held that Article 14(5) ICCPR "can only be exercised effectively if the convicted person is entitled to have access to a […] written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal, also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal".[742] Provided that it has been established that the person concerned has suffered harm,[743] violations of Article 14(5) ICCPR have been found for the lack of: trial transcripts;[744] a written appellate judgment;[745] a copy of a first instance judgment;[746] and the failure to notify the person concerned of a first instance judgment[747]. Nevertheless, a written appellate judgment may be replaced by notes of an oral judgment, even when less elaborate than desirable.[748]

In addition to its mere availability, the HRC has also indicated that a first instance judgment must be "duly reasoned".[749] Whereas this requirement is closely affiliated with the obligation to substantially review the conviction and sentence,[750] it has been invoked in the context of the effective exercise of the right to appeal, in particular in multi-tiered appellate systems. As indicated, Article 14(5) ICCPR "does not require States parties to provide for several instances of appeal",[751] but "the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person

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[741] Views, *Lovell v. Australia*, Communication No. 920/2000, HRC, 24 March 2003, at 8.4.
[742] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 49.
[743] Views, *Ruiz Agudo v. Spain*, Communication No. 864/1999, HRC, 31 October 2002, at 9.3.
[744] HRC, *Lumley v. Jamaica*, Communication No. 662/1995, 31 March 1991, at 3.2-3.3, 7.5; Views, *Timmer v. the Netherlands*, Communication No. 2097/2011, HRC, 24 July 2014, at 7.2.
[745] Views, *Little v. Jamaica*, Communication No. 283/1988, HRC, 1 November 1991, at 8.5.
[746] Views, *Musaeva v. Uzbekistan*, Communications Nos. 1914, 1915 & 1916/2009, HRC, 21 March 2012, at 9.5; Views, *Timmer v. the Netherlands*, Communication No. 2097/2011, HRC, 24 July 2014, at 7.2.
[747] Views, *J.O. v. France*, Communication No. 1620/2007, HRC, 23 March 2011, at 9.7.
[748] Views, *Bailey v. Jamaica*, Communication No. 709/1996, HRC, 21 July 1999, at 7.4.
[749] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 49.
[750] Part II, Chapter 2.3.6.
[751] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 45.

must have effective access to each of them".[752] This formulation was explicitly invoked in several communications in which the failure of an appellate court to issue a written judgment hampered further appellate recourse and, thus, contravened Article 14(5) ICCPR.[753]

2.3.8. Legal Assistance

In General Comment 32, the HRC considered that, besides a violation of Article 14(3)(d) ICCPR,[754] "[a] denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes […] a violation of […] article 14, paragraph 5 [ICCPR], as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court".[755]

Nevertheless, this aspect of the right to appeal has not been limited to the need to provide legal aid for appellate review of cases involving capital punishment. The HRC has, in respect of other types of criminal proceedings, also assessed the need for legal representation on appeal, as such, and the requirement of effective legal assistance on appeal. As to the former issue, it has found that an appeal had not been effectively considered, as no lawyer was available to submit grounds of appeal[756] and that, due to a lack of information on whether the author was informed of the date of the hearing for application for leave to appeal and of the representative appointed to him on appeal, it was "unclear whether the author was at all represented on appeal".[757] As to the latter issue, General Comment 32 sets forth that the right to appeal "is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek

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[752] Ibid., at 45. Also: Views, *Werenbeck v. Australia*, Communication No. 579/1994, HRC, 27 March 1997, at 9.11.

[753] Views, *Henry v. Jamaica*, Communication No. 230/1987, HRC, 1 November 1991, at 8.4; Views, *Reid v. Jamaica*, Communication No. 355/1989, HRC, 8 July 1994, at 14.4; Views, *Bailey v. Jamaica*, Communication No. 709/1996, HRC, 21 July 1999, at 7.4; Views, *Aboushanif v. Norway*, Communication No. 1542/2007, HRC, 17 July 2008, at 7.2. Similar: Views, *Pratt & Morgan v. Jamaica*, Communications Nos. 210/1986 & 225/1987, HRC, 6 April 1989, at 13.5; Views, *Kelly v. Jamaica*, Communication No. 253/1987, HRC, 8 April 1991, at 5.12; Views, *Little v. Jamaica*, Communication No. 283/1988, HRC, 1 November 1991, at 8.5; Views, *Francis v. Jamaica*, Communication No. 320/1988, HRC, 24 March 1993, at 12.2; Views, *Collins v. Jamaica*, Communication No. 356/1989, HRC, 25 March 1993, at 8.3; Views, *Smith v. Jamaica*, Communication No. 282/1988, HRC, 31 March 1993, at 10.5; Views, *Hamilton v. Jamaica*, Communication No. 333/1988, HRC, 23 March 1994, at 9.1; Views, *Currie v. Jamaica*, Communication No. 377/1989, HRC, 29 March 1994, at 13.5; Views, *Champagnie v. Jamaica*, Communication No. 445/1991, HRC, 18 July 1994, at 7.3; Views, *Morrison v. Jamaica*, Communication No. 663/1995, HRC, 3 November 1998, at 8.5.

[754] Part II, Chapter 2.2.3.

[755] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 51.

[756] Views, *Hill & Hill v. Spain*, Communication No. 526/1993, HRC, 2 April 1997, at 14.3.

[757] Views, *Lumley v. Jamaica*, Communication No. 662/1995, HRC, 31 March 1999, at 7.4.

alternative representation, in order that their concerns may be ventilated at the appeal level".[758] As mentioned, such matters have been adjudicated with reference to, or in conjunction with, Article 14(3)(b) and Article 14(3)(d) too,[759] but the HRC has invoked Article 14(5) ICCPR on its own in these circumstances as well.[760]

2.3.9. Reasoned Opinion

In close connection with the scope of appellate review under Article 14(5) ICCPR, a slightly distinct strand of views of the HRC has addressed the need to provide sufficient reasoning on appeal. The HRC has, namely, considered an allegation of the lack of "a duly reasoned written judgement" against the "duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case".[761]

This matter has mainly arisen in respect of leave to appeal proceedings. In this regard, the HRC has found that the absence of reasoning[762] or the provision of reasoning that does not reflect sufficient consideration of the legal and factual matters pertinent to the case falls short of Article 14(5) ICCPR.[763] However, the provision of concise reasoning, which nevertheless reflected sufficient consideration of the issues at stake, has been deemed acceptable.[764]

2.3.10. Presence

As discussed, the exclusion of a defendant and/or his lawyer from appellate hearings may amount to a violation of the right to equal treatment under Article 14(1) ICCPR[765] or the right to be present under Article 14(3)(d) ICCPR[766]. However, the ICCPR has also found that Article 14(5) ICCPR has been violated in the same situation, i.e. "the examination of the

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[758] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 51.
[759] Part II, Chapter 2.2.2.; Part II, Chapter 2.2.3.
[760] Views, *Gallimore v. Jamaica*, Communication No. 680/1996, HRC, 23 July 1999, at 7.4.
[761] Views, *T.L.N. v. Norway*, Communication No. 1942/2010, HRC, 16 July 2014, at 9.2.
[762] Views, *Reid v. Jamaica*, Communication No. 355/1989, HRC, 8 July 1994, at 14.3.
[763] Views, *Mennen v. the Netherlands*, Communication No. 1797/2008, HRC, 27 July 2010, at 8.3; Views, *Timmer v. the Netherlands*, Communication No. 2097/2011, HRC, 24 July 2014, at 7.3. Also: Part II, Chapter 2.3.6.2.
[764] Views, *T.L.N. v. Norway*, Communication No. 1942/2010, HRC, 16 July 2014, at 9.3; Views, *H.K. v. Norway*, Communication No. 2004/2010, HRC, 16 October 2014, at. 9.4-9.6.
[765] Part II, Chapter 2.1.1.
[766] Part II, Chapter 2.2.3.

author's case under the supervisory […] procedure by the Supreme Court […] in his and in his lawyers' absence, although with the participation of a prosecutor".[767]

3. ECHR

As indicated,[768] prior to the adoption of Protocol 7 ECHR, the ECtHR had already emphasised that "criminal proceedings form an entity"[769] and that, therefore, appellate proceedings do not escape the scrutiny of Article 6 ECHR. In more specific terms, after the ECmHR had already assessed aspects of appellate proceedings against Article 6 ECHR,[770] the ECtHR declined to declare this provision inapplicable to appellate proceedings on matters of law, on the basis that such proceedings would not determine the criminal charge as required by the words "*bien-fondé de toute accusation*" in the French version of this Article. In this regard, it noted that: (i) cassatory proceedings continue to affect the person concerned; (ii) the reference to "*bien-fondé*" requires the accusation to be well-founded in law and not only in fact; and (iii) the English version of Article 6 ECHR mentions the "determination of […] any criminal charge", which is not determined as long as it is not "final".[771] It, accordingly, concluded that the ECHR does not compel States Parties to set up appellate or cassatory courts but, if established, such courts must function in accordance with Article 6 ECHR, "dependent on the special features of such proceedings".[772] Therefore, the pertinent components of Article 6 ECHR and Article 2 Protocol 7 ECHR will be considered in relation to the ECtHR's assessment of appellate proceedings.

3.1. Article 6(1) ECHR

Article 6(1) lays down a right "to a fair and public hearing […] by an independent and impartial tribunal established by law" and the right to public pronouncement of a judgment.

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[767] Views, *Kulov v. Kyrgyzstan*, Communication No. 1369/2005, HRC, 19 August 2010, at 8.8. The HRC considered the exact same claim under Article 14(5) ICCPR in another communication, although it ultimately concluded that "the author has failed to substantiate that his inability to attend the proceedings at the Court of Appeal resulted in a violation of his rights under article 14 (5) of the Covenant". See: Views, *E.Z. v. Kazakhstan*, Communication No. 2021/2010, HRC, 1 April 2015, at 7.6.
[768] Introduction, Chapter 2.1.2.
[769] E.g., Judgment, *Delcourt v. Belgium*, Application No. 2689/65, ECtHR, 17 January 1970, at 24-25; Judgment, *Monnell & Morris v. the United Kingdom*, Applications Nos. 9562/81 & 9818/82, ECtHR, 2 March 1987, at 54; Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 24; Judgment, *Belziuk v. Poland*, Application No. 23103/93, ECtHR, 25 March 1998, at 37; Judgment, *Assanidze v. Georgia*, Application No. 71503/01, ECtHR, 8 April 2004, at 182.
[770] E.g., Judgment, *Ofner & Hopfinger v. Austria*, Applications Nos. 524/56 & 617/59, ECmHR, 23 November 1962, at 46-49; Judgment, *Pataki & Dunshirn v. Austria*, Applications Nos. 596/59 & 789/60, ECmHR, 28 March 1963, at 36.
[771] Judgment, *Delcourt v. Belgium*, Application No. 2689/65, ECtHR, 17 January 1970, at 24-25.
[772] Ibid., at 25-26.

3.1.1. Fair Hearing

Article 6 ECHR has, no different from the remaining provisions, been subject to a teleological interpretation. In this regard, the ECtHR has found that the ECHR is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective".[773] It has, on this basis, developed a number of rights and principles not explicitly set forth under Article 6 ECHR. The effects of this interpretation of Article 6 ECHR have most clearly manifested themselves in relation to the general reference to "a fair […] hearing" in Article 6(1) ECHR. A number of them have been applied in respect of appellate proceedings too, namely the rights to access to court, adversarial proceedings, equality of arms, and a reasoned opinion.

According to the Strasbourg organs, Article 6(1) ECHR "secures to everyone the right to have any claim […] brought before a court or tribunal" and, in this way, it "embodies the 'right to a court'".[774] As part of this right, "[t]he right of access, that is the right to institute proceedings before courts […], constitutes one aspect".[775] Two main issues have been considered in relation to appellate proceedings on this basis. First, even though Article 6 ECHR does not guarantee a right to appeal,[776] the standing to bring an appeal in systems providing for appellate review has been assessed with reference to the right of access to a court. In this regard, the main outcome of the Strasbourg jurisprudence is that the refusal to entertain an appeal, on account of the person concerned having absconded, has been deemed an excessive restriction of the right of access to a court.[777] On the other hand, no violation of Article 6(1) ECHR has been found when there was "no obligation to surrender to custody as a precondition" for appeal and "the path to the court of cassation opened itself to the applicant once he chose to be present".[778] Moreover, in line with the general jurisprudence of the ECtHR, which has established that the procedural safeguards guaranteed by the ECHR may

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[773] E.g., Judgment, *Artico v. Italy*, Application No. 6694/74, ECtHR, 13 May 1980, at 33; Judgment, *Imbrioscia v. Switzerland*, Application No. 13972/88, ECtHR, 24 November 1993, at 38; Judgment, *Hermi v. Italy*, Application No. 18114/02, ECtHR, 18 October 2006, at 95.
[774] Judgment, *Golder v. The United Kingdom*, Application No. 4451/70, ECtHR, 21 February 1975, at 36.
[775] Ibid., at 36.
[776] E.g., Judgment, *Delcourt v. Belgium*, Application No. 2689/65, ECtHR, 17 January 1970, at 25-26; Judgment, *Crociani et al. v. Italy*, Application No. 8603/79, ECmHR, 18 December 1980, para 16-17.
[777] E.g., Judgment, *Poitrimol v. France*, Application No. 14032/88, ECtHR, 23 November 1993, at 36-38; Judgment, *Omar v. France*, Application No. 43/1997/827/1033, ECtHR, 29 July 1998, at 40-44; Judgment, *Guérin v. France*, Application No. 25201/94, ECtHR, 29 July 1998, at 43-47; Judgment, *Khalfaoui v. France*, Application No. 34791/97, ECtHR, 14 December 1999, at 40-54; Judgment, *Papon v. France*, Application No. 54210/00, ECtHR, 25 July 2002, at 99-100; Judgment, *Skondrianos v. Greece*, Application No. 74291/01, ECtHR, 18 December 2003, at 27.
[778] E.g., Judgment, *Eliazer v. the Netherlands*, Application No. 38055/97, ECtHR, 16 October 2001, at 33-34.

be waived, provided that such waivers are "unequivocal", "attended by minimum safeguards" and do "not run counter to any important public interest",[779] the right of access to an appellate court may be renounced as a result of, for instance, a plea-bargaining deal.[780] Second, the Strasbourg organs have evaluated whether practical or procedural impediments have thwarted access to an appellate court. In general, such limitations are permitted, "since the right of access by its very nature calls for regulation by the State", but they "must not restrict the access […] in such a way or to such an extent that the very essence of the right is impaired".[781] For example, insufficient safeguards to prevent a misunderstanding as to the appellate jurisdiction competent to examine an appeal,[782] incorrect information as to the specific time-limits for the filing of an appeal,[783] the effective shortening of time-limits concerning an appeal,[784] and the lack of a voluntary and unequivocal waiver of the right to legal assistance, which served as a precondition for filing an appeal,[785] have been found incompatible with this right. Conversely, fines for vexatious appeals,[786] the requirement to be represented by a lawyer (as opposed to the facility of defending oneself in person),[787] the unequivocal waiver of the right to appeal accompanied with procedural safeguards,[788] and a sufficient degree of reasoning[789] have not been deemed to transgress Article 6(1) ECHR.

Furthermore, the adversarial principle has been deduced from the general right to a fair trial contained in Article 6(1) ECHR. This requirement entails "the opportunity for the parties to a criminal […] trial to have knowledge of and comment on all evidence adduced or observations filed […] with a view to influencing the court's decision".[790] In this regard, the Strasbourg organs have found fault with the outright non-communication of relevant

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[779] Judgment, *Litwin v. Germany*, Application No. 29090/06, ECtHR, 3 November 2011, at 37.
[780] Ibid., at 38-49.
[781] Judgment, *Khalfaoui v. France*, Application No. 34791/97, ECtHR, 14 December 1999, at 35-36.
[782] Judgment, *Hajiyev v. Azerbaijan*, Application No. 5548/03, ECtHR, 16 November 2006, at 34-46.
[783] Judgment, *Korgul v. Poland*, Application No. 35916/08, ECtHR, 17 April 2012, at 27-31.
[784] Judgment, *Viard v. France*, Application No. 71658/10, ECtHR, 9 January 2014, at 37-39.
[785] Judgment, *Nalbandyan v. Armenia*, Applications Nos. 9935/06 and 23339/06, ECtHR, 31 March 2015, at 146-150.
[786] Judgment, *G.L. v. Italy*, Application No. 15384/89, ECmHR, 9 May 1994, at 8. Although the ECtHR did not use the same terminology, it adopted a similar conclusion in respect of the possibility of an additional loss of liberty in the context of meritless applications for leave to appeal, considering that the overall procedure had been fair: Judgment, *Monnell and Morris v. the United Kingdom*, Applications Nos. 9562/81 & 9818/82, ECtHR, 2 March 1987, at 64. Also: Part I, Chapter 3.1.
[787] Judgment, *Philis v. Greece*, Application No. 16598/90, ECmHR, 11 December 1990, at 1.
[788] Judgment, *Litwin v. Germany*, Application No. 29090/06, ECtHR, 3 November 2011, at 37-49.
[789] Judgment, *Nedzela v. France*, Application No. 73695/01, ECtHR, 27 July 2006, at 55-59.
[790] Judgment, *Reinhardt & Slimane-Kaïd v. France*, Applications Nos. 21/1997/805/1008 and 22/1997/806/1009, ECtHR, 31 March 1998, at 103.

documents to defendants,[791] unless such non-communication could not have affected the outcome of the process.[792] Moreover, a different strand of jurisprudence concerning the adversarial principle in appellate proceedings is apparent too. Violations of Article 6(1) ECHR have been found where appellate courts, mandated to review matters of facts and law, have reversed first instance acquittals on the basis of the same evidence that had led to acquittal at first instance, without rehearing the person concerned and/or witnesses testifying at first instance. Although the adversarial principle has been stressed implicitly or explicitly, the Strasbourg organs' reasoning fluctuates slightly. First, the lack of a public hearing with a view to adversarial argument has been noted as the underlying reason of the violation.[793] Second, a breach has been established on account of the deprivation of the right to put forward a defence in the context of adversarial proceedings.[794] Finally, the plain non-compliance with the right to a fair trial has been emphasised, which has been combined with an observation that the rights of the defence have been limited in certain instances.[795]

In addition, the right to a fair hearing encompasses the principle of equality of arms, which "requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-à-vis another party".[796] This right substantially overlaps with the adversarial principle.[797] Indeed, as with the latter, the

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[791] E.g., Judgment, *Brandstetter v. Austria*, Application No. 11170/84, 12876/87, 13468/87, ECtHR, 28 August 1991, at 66-69; Judgment, *Reinhardt & Slimane-Kaïd v. France*, Applications Nos. 21/1997/805/1008 and 22/1997/806/1009, ECtHR, 31 March 1998, at 105-107; Judgment, *Meftah v. France*, Application No. 32911/96, ECtHR, 26 April 2001, at 40-43; Judgment, *M.S. v. Finland*, Application No. 46601/99, ECtHR, 22 March 2005, at 33-37.
[792] E.g., Judgment, *Verdu Verdu v. Spain*, Application No. 43432/02, ECtHR, 15 February 2007, at 25-27.
[793] E.g., Judgment, *Popovici v. Moldova*, Applications Nos. 289/04 & 41194/04, ECtHR, 27 November 2007, at 70-72; Judgment, *Marcos Barrios v. Spain*, Application No. 17122/07, ECtHR, 21 September 2010, at 6-15, 41; Judgment, *García Hernández v. Spain*, Application No. 15256/07, ECtHR, 16 November 2010, at 32-35.
[794] E.g., Judgment, *Lacadena Calero v. Spain*, Application No. 23002/07, ECtHR, 22 November 2011, at 49-51; Judgment, *Serrano Contreras v. Spain*, Application No. 49183/08, ECtHR, 20 March 2012, at 35-42; Judgment, *Vilanova Goterris & Llop Garcia v. Spain*, Applications Nos. 5606/09 & 17516/09, ECtHR, 27 November 2012, at 33-37; Judgment, *Roman Zurdo et al. v. Spain*, Applications Nos. 28399/09 and 51135/09, ECtHR, 8 October 2013, at 31-41.
[795] E.g., Judgment, *Manolachi v. Romania*, Application No. 36605/04, ECtHR, 5 March 2013, at 44-52; Judgment, *Flueraş v. Romania*, Application No. 17520/04, ECtHR, 9 April 2013, at 57-62; Judgment, *Hanu v. Romania*, Application No. 10890/04, ECtHR, 4 June 2013, at 34-42; Judgment, *Hogea v. Romania*, Application No. 31912/04, ECtHR, 29 October 2013, at 46-54; Judgment, *Tudor v. Romania*, Application No. 14364/06, ECtHR, 17 December 2013, at 23-29; Judgment, *Cipleu v. Romania*, Application No. 36470/08, ECtHR, 14 January 2014, at 33-41; Judgment, *Văduva v. Romania*, Application No. 27781/06, ECtHR, 25 February 2014, at 41-50; Judgment, *Mischie v. Romania*, Application No. 50224/07, ECtHR, 16 September 2014, at 35-41; Judgment, *Moinescu v. Romania*, Application No. 16903/12, ECtHR, 15 September 2015, at 36-41; Judgment, *Marius Dragomir v. Romania*, Application No. 21528/09, ECtHR, 6 October 2015, at 21-28.
[796] D. Vitkauskas and G. Dikov, Protecting the Right to a Fair Trial under the European Convention on Human Rights, Council of Europe Human Rights Handbooks (Strasbourg: Council of Europe, 2012), at 48.
[797] Ibid., at 48.

non-communication of documents to the defence has been found to constitute a breach of the principle of equality of arms.[798] In addition, the fact that a party was entitled to be present at appellate proceedings, whereas the defence was not, has also been considered a violation.[799]

In addition to its interrelationship with the right of access to a court, the sufficiency of judicial reasoning has been reviewed under a more general reference to Article 6(1) ECHR. In this regard, the ECtHR has considered that, "reflecting a principle linked to the proper administration of justice under Article 6 § 1 […] [ECHR], the judgments of courts and tribunals should adequately state the reasons on which they are based, and which should be void of manifest arbitrariness, in order to show that the parties were duly heard and ensure public scrutiny of the administration of justice".[800] This aspect of Article 6(1) ECHR "cannot be understood as requiring a detailed answer to every argument raised by the parties", but "the injured party can expect a specific and express reply from the court to those submissions which are decisive for the outcome of the proceedings in question".[801] Such an assessment must be carried out in the circumstances of each case.[802] For instance, violations have been found where appellate courts have failed to provide "any meaningful consideration" to determinative matters of fact and/or law[803] or where unreasoned jury decisions on appeal had not been accompanied with sufficient safeguards,[804] especially where a first instance acquittal had been converted into an appellate conviction.[805] Conversely, neither limited reasoning in appellate jury trials compensated with sufficient safeguards[806] nor the complete absence of reasons concerning the rejection of applications for leave to appeal[807] amount to a breach of this requirement according to the Strasbourg organs.

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[798] E.g., Judgment, *Borgers v. Belgium*, Application No. 12005/86, ECtHR, 30 October 1991, at 27-29; Judgment, *Zahirović v. Croatia*, Application No. 58590/11, ECtHR, 25 April 2013, at 44-50.
[799] E.g., Judgment, *Borgers v. Belgium*, Application No. 12005/86, ECtHR, 30 October 1991, at 28; Judgment, *Eftimov v. The Former Yugoslav Republic of Macedonia*, Application No. 59974/08, ECtHR, 2 July 2015, at 38-42. Contra: Judgment, *Monnell and Morris v. the United Kingdom*, Applications Nos. 9562/81 & 9818/82, ECtHR, 2 March 1987, at 62; Judgment, *Sibgatullin v. Russia*, Application No. 32165/02, ECtHR, 23 April 2009, at 42.
[800] Judgment, *Tchankotadze v. Georgia*, Application No. 15256/05, ECtHR, 21 June 2016, at 102.
[801] Ibid., at 103.
[802] Ibid., at 103.
[803] E.g., Judgment, *Tchankotadze v. Georgia*, Application No. 15256/05, ECtHR, 21 June 2016, at 107-109.
[804] E.g., Judgment, *Oulahcene v. France*, Application No. 44446/10, ECtHR, 10 January 2013, at 47-55.
[805] E.g., Judgment, *Agnelet v. France*, Application No. 61198/08, ECtHR, 10 January 2013, at 63-73; Judgment, *Fraumens v. France*, Application No. 30010/10, ECtHR, 10 January 2013, at 41-52.
[806] E.g., Judgment, *Legillon v. France*, Application No. 53406/10, ECtHR, 10 January 2013, at 59-67; Judgment, *Bodein v. France*, Application No. 40014/10, ECtHR, 13 November 2014, at 37-42.
[807] E.g., Judgment, *E.M. v. Norway*, Application No. 20087/92, ECmHR, 26 October 1995, at 2; Judgment, *Peterson Sarpsborg As et al. v. Norway*, Application No. 25944/94, ECmHR, 27 November 1996, at 2.

3.1.2. Public Hearing

The right to a public hearing arising out of Article 6(1) ECHR is a multi-faceted concept. According to the ECtHR, it is "an additional guarantee that an endeavour will be made to establish the truth", it helps to ensure that the accused "is satisfied that his case is being determined by a tribunal whose independence and impartiality he may verify", it "protects litigants against the administration of justice in secret without public scrutiny", and it is "one of the means whereby confidence in the courts, superior and inferior, can be maintained".[808]

In connection with appellate proceedings, the Strasbourg organs have, primarily, assessed whether or not cases decided without a hearing have been in keeping with this right. The absence of such hearings is not inherently incompatible with this element of Article 6 ECHR. For instance, "leave-to-appeal proceedings and proceedings involving only questions of law […] may comply with the requirements of Article 6 […] [ECHR], although the appellant was not given an opportunity of being heard in person by the appeal or cassation court".[809]

However, violations have been found where appellate courts have had to make a full assessment of the guilt or innocence of the person concerned without conducting a public hearing.[810] In certain cases, the ECtHR has emphasised the fact that the applicants in question had been convicted for the first time in appellate proceedings.[811] This approach of the Strasbourg organs closely approximates the aforementioned component of the right to adversarial proceedings concerning the rehearing of the person concerned and/or witnesses testifying at first instance.[812] The ECtHR has stressed that the lack of a public hearing entailed

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[808] Judgment, *Tierce et al. v. San Marino*, Applications Nos. 24954/94, 24971/94, & 24972/94, ECtHR, 25 July 2000, at 92.
[809] Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 31. E.g., Judgment, *Sutter v. Switzerland*, Application No. 8209/78, ECtHR, 22 February 1984, at 30; Judgment, *Pérez Martínez v. Spain*, Application No. 26023/10, ECtHR, 23 February 2016, at 35-41.
[810] E.g., Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 32; Judgment, *Botten v. Norway*, Application No. 16206/90, ECtHR, 19 February 1996, at 49-51; Judgment, *Tierce et al. v. San Marino*, Applications Nos. 24954/94, 24971/94, & 24972/94, ECtHR, 25 July 2000, at 96-102; Judgment, *Dondarini v. San Marino*, Application No. 50545/99, ECtHR, 6 July 2004, at 28-29; Judgment, *Moreira Ferreira v. Portugal*, Application No. 19808/08, ECtHR, 5 July 2011, at 32-35.
[811] See: e.g., Judgment, *Constantinescu v. Romania*, Application No. 28871/95, ECtHR, 27 June 2000, at 54-61; Judgment, *Arnarsson v. Iceland*, Application No. 44671/98, ECtHR, 15 July 2003, at 31-38; Judgment, *Dănilă v. Romania*, Application No. 53897/00, ECtHR, 8 March 2007, at 38-43; Judgment, *Spînu v. Romania*, Application No. 32030/02, ECtHR, 29 April 2008, at 56-64; Judgment, *Igual Coll v. Spain*, Application No. 37496/04, ECtHR, 10 March 2009, at 37-38; Judgment, *Gómez Olmeda v. Spain*, Application No. 61112/12, ECtHR, 29 March 2016, at 33-40.
[812] Part II, Chapter 3.1.1.

the absence of "a direct assessment of the evidence given in person by the applicant".[813] Such an assessment has been primarily referred to in the context of matters of a predominantly factual nature, such as the use of the appropriate equipment in a rescue operation,[814] the clarification of witness statements,[815] the credibility of decisive witnesses,[816] and the conduct of a medical nurse concerning the death of a patient.[817] Accordingly, in line with its function as "an endeavour […] to establish the truth",[818] the determinative consideration was, thus, the impossibility of sufficiently assessing evidence on appeal and not the public nature of the hearing, as such. Importantly, the ECtHR has specifically rejected a deleterious effect of Protocol 7 ECHR on Article 6(1) ECHR. In this regard, it had been argued that "only the fundamental guarantees of Article 6 […] [apply] in […] appeal proceedings and that these did not include further oral hearings before courts of second instance", in support of which "Article 2 of Protocol 7 […] and the statement in the Explanatory Report […] that the 'modalities for the exercise of the right [of appeal] and the grounds on which it may be exercised [are] to be determined by domestic law'" had been invoked.[819] The ECtHR dismissed such an interpretation, characterising Protocol 7 ECHR as an addition to the ECHR, as opposed to a limitation of the rights contained therein.[820] However, although the reference to a "full rehearing" in early jurisprudence creates some ambiguity in this regard,[821] the ECtHR's intention has not been to demand a rerun of the entire trial at first instance on this basis. The preceding examples concern specific matters of a factual nature. This entails that a circumscribed widening of the scope of appellate proceedings is required so as to ensure proper determination of decisive issues.

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[813] E.g., Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 32. Similar: Judgment, *Botten v. Norway*, Application No. 16206/90, ECtHR, 19 February 1996, at 52; Judgment, *Constantinescu v. Romania*, Application No. 28871/95, ECtHR, 27 June 2000, at 59; Judgment, *Tierce et al. v. San Marino*, Applications Nos. 24954/94, 24971/94, & 24972/94, ECtHR, 25 July 2000, at 102; Judgment, *Arnarsson v. Iceland*, Application No. 44671/98, ECtHR, 15 July 2003, at 38; Judgment, *Dănilă v. Romania*, Application No. 53897/00, ECtHR, 8 March 2007, at 42; Judgment, *Spînu v. Romania*, Application No. 32030/02, ECtHR, 29 April 2008, at 64; Judgment, *Igual Coll v. Spain*, Application No. 37496/04, ECtHR, 10 March 2009, at 37; Judgment, *Moreira Ferreira v. Portugal*, Application No. 19808/08, ECtHR, 5 July 2011, at 34; Judgment, *Gómez Olmeda v. Spain*, Application No. 61112/12, ECtHR, 29 March 2016, at 35.
[814] Judgment, *Botten v. Norway*, Application No. 16206/90, ECtHR, 19 February 1996, at 49.
[815] Judgment, *Spînu v. Romania*, Application No. 32030/02, ECtHR, 29 April 2008, at 62.
[816] Judgment, *Marcos Barrios v. Spain*, Application No. 17122/07, ECtHR, 21 September 2010, at 39-40.
[817] Judgment, *García Hernández v. Spain*, Application No. 15256/07, ECtHR, 16 November 2010, at 33.
[818] Judgment, *Tierce et al. v. San Marino*, Applications Nos. 24954/94, 24971/94, & 24972/94, ECtHR, 25 July 2000, at 92.
[819] Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 26 (emphasis supplied).
[820] Ibid., at 26-33.
[821] Ibid., at 32.

3.1.3. Impartial Tribunal

According to the ECtHR, "[t]he requirement of impartiality concerns the questions of whether the court is "subjectively free of personal prejudice or bias" and whether it offers "sufficient guarantees to exclude any legitimate doubt" in this regard.[822]

The issues raised in the context of appellate proceedings primarily concern the accumulation of different judicial functions in pre-appeal proceedings and appeal proceedings. Whereas such matters need not be in contravention of the impartiality requirement, as such,[823] particular combinations of such functions have been found to divulge a lack of impartiality. Examples concern the involvement of the same judges in: (i) the appellate remittal of a first instance discontinuance of criminal proceedings and the appellate proceedings against the renewed trial at first instance, which was not allowed under domestic law;[824] (ii) the appellate confirmation that there was sufficient evidence for the offence with which the applicant was charged and the first instance proceedings;[825] and (iii) a decision concerning provisional detention, in which it had been concluded that the person concerned had probably committed the acts charged, and the appellate proceedings.[826] In addition, the ECtHR has extended this principle to interrelated appellate proceedings. In this respect, it has found a violation of the impartiality requirement, because, in an appellate judgment concerning one couple, numerous references to the criminal responsibility of another couple in the crimes under consideration appeared and, subsequently, the latter couple was convicted by the same judge in a separate appellate judgment containing numerous extracts from the initial judgment.[827]

3.1.4. Public Pronouncement of Judgment

This requirement shares common features with the need for a public hearing. As held by the ECtHR, "[t]he principle of the public nature of court proceedings entails two aspects: the holding of public hearings and the public delivery of judgments".[828] Even so, these matters

[822] Judgment, *Findlay v. the United Kingdom*, Application No. 22107/93, ECtHR, 25 February 1997, at 73.
[823] E.g., Judgment, *Ionuţ-Laurenţiu Tudor v. Romania*, Application No. 34013/05, ECtHR, 24 June 2014, at 81.
[824] Judgment, *Oberschlick v. Austria*, Application No. 11662/85, ECtHR, 23 May 1991, at 50.
[825] Judgment, *Castillo Algar v. Spain*, Application No. 28194/95, ECtHR, 28 October 1998, at 46-51.
[826] Judgment, *Ionuţ-Laurenţiu Tudor v. Romania*, Application No. 34013/05, ECtHR, 24 June 2014, at 77-87.
[827] Judgment, *Ferrantelli & Santangelo v. Italy*, Application No. 19874/92, ECtHR, 7 August 1996, at 26, 30, 59, 60.
[828] Judgment, *Tierce et al. v. San Marino*, Applications Nos. 24954/94, 24971/94, & 24972/94, ECtHR, 25 July 2000, at 93.

have distinct fields of application, considering that, beyond the distinction drawn in the wording of Article 6(1) ECHR, the ECtHR has assessed them separately.[829]

According to the ECtHR, a lowered standard is applicable to appellate proceedings. Whereas the words "'judgment shall be pronounced publicly' […] might suggest that a reading out aloud of the judgment is required",[830] "many member States of the Council of Europe have a long-standing tradition of recourse to other means […] for making public the decisions of all or some of their courts, and especially of their courts of cassation", which "[t]he authors of the […] [ECHR] cannot have overlooked".[831] Thus, "the form of publicity given to the 'judgment' […] must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of" Article 6(1) ECHR.[832] For instance, the possibility to obtain a copy of a judgment upon application, coupled with the publication of judgments in an official publication, was considered sufficient for these purposes.[833]

3.2. Article 6(3) ECHR

The specific guarantees for those charged with a criminal offence in Article 6(3) ECHR have been applied extensively in the Strasbourg organs' assessment of the fairness of appellate proceedings, with the exception of paragraph (e), which pertains to the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

3.2.1. Article 6(3)(a) ECHR

The right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him" points "to the need for special attention to be paid to the notification of the 'accusation' to the defendant", which encompasses detailed information "not only of […] the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts".[834] The protection proffered by this guarantee may be prompted in appellate proceedings if the offence is subject to legal recharacterisation or where the facts are, as such, subject to reappraisal.[835]

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[829] E.g., Judgment, *Sutter v. Switzerland*, Application No. 8209/78, ECtHR, 22 February 1984, at 29-34.
[830] Ibid., at 32.
[831] Ibid., at 33.
[832] Ibid., at 33.
[833] Ibid., at 34.
[834] Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999, at 51.
[835] At times, the ECtHR has assessed these issues in conjunction with Article 6(1) ECHR and Article 6(3)(b) ECHR. As to the former, it has held that the provision of the information foreseen by Article 6(3)(a) ECHR "is

As to the former matter, the ECtHR has found a violation of Article 6(3)(a) ECHR, where, without sufficient notice[836] to the person concerned: (i) a first instance acquittal for a crime had been recharacterised into aiding and abetting that crime;[837] (ii) a conviction for attempt to commit a crime had been altered into complicity in an attempt to commit that crime, notwithstanding the consequential alleviation of the sentence;[838] or (iii) the conviction for a crime at trial had been substituted for conviction for another crime carrying a reduced sentence on appeal.[839] Conversely, no violations have been found by the Strasbourg bodies where: (i) appeals by prosecutorial authorities or defendants explicitly seek requalification of inferior judgments;[840] (ii) requalifications of acquittals or convictions by inferior instances precede appeals to higher instances endowed with jurisdiction over relevant legal and factual aspects;[841] (iii) higher instances take account of elements not explicitly addressed by lower instances but intrinsic to the original accusation;[842] or (iv) defendants are allowed to comment before appellate courts (of final instance) on a possible requalification.[843]

As to the second matter, the ECtHR has considered Article 6(3)(a) ECHR breached where an appellate court had modified the mode of liability established at first instance and lowered the sentence imposed, because "the description of the factual situation set out in the indictment […] changed during the proceedings", which "did not constitute an element intrinsic to the initial accusation".[844] Moreover, notwithstanding the fact that the applicant anticipated a

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an essential prerequisite for ensuring that the proceedings are fair" (Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999, at 52). Furthermore, Arts. 6(3)(a) and 6(3)(b) ECHR "are connected and […] the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence" (Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999, at 54). However, for the sake of convenience, and considering that Article 6(3)(a) ECHR is the most specific legal basis, these matters will be exclusively assessed under this provision.

[836] The sufficiency of the notification is dependent on the specific circumstances. It can even be provided on appeal. See: e.g., Judgment, *Bäckström & Andersson v. Sweden*, Application No. 67930/01, ECtHR, 5 September 2006, at 8-10.

[837] Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999, at 55-63.

[838] Judgment, *Mattei v. France*, Application No. 34043/02, ECtHR, 19 December 2006, at 38-44.

[839] Judgment, *Varela Geis v. Spain*, Application No. 61005/09, ECtHR, 5 March 2013; at 45-55.

[840] E.g., Judgment, *Ramos Ruiz v. Spain*, Application No. 65892/01, ECtHR, 19 February 2002, at 5-6; Judgment, *Kwiatkowska v. Italy*, Application No. 52868/99, ECtHR, 30 November 2000, at 6-8.

[841] E.g., Judgment, *Dallos v. Hungary*, Application No. 29082/95, ECtHR, 1 March 2001, at 48-53; Judgment, *Sipavičius v. Lithuania*, Application No. 49093/99, ECtHR, 21 February 2002, at 29-34; Judgment, *Feldman v. France*, Application No. 53426/99, ECtHR, 6 June 2002, at 6-9; Judgment, *Balette v. Belgium*, Application No. 48193/99, ECtHR, 24 June 2004, at 7-8.

[842] Judgment, *Salvador Torres v. Spain*, Application No. 21525/93, ECtHR, 24 October 1996, at 30-33.

[843] E.g., Judgment, *Bäckström & Andersson v. Sweden*, Application No. 67930/01, ECtHR, 5 September 2006, at 8-10; Judgment, *Pérez Martínez v. Spain*, Application No. 26023/10, ECtHR, 23 February 2016, at 26-29.

[844] Judgment, *Juha Nuutinen v. Finland*, Application No. 45830/99, ECtHR, 24 April 2007, at 32.

possible appellate requalification, he "was denied the possibility to argue his defence in adversarial proceedings insofar as the element introduced by the […] [second instance] […] was concerned"[845] and, as the third instance denied leave to appeal, the applicant "did not have sufficient opportunity to defend himself before the highest court".[846] An appellate requalification of the factual basis defined at first instance appears to carry more weight in the assessment of the ECtHR than a legal requalification. For instance, in addition to the fact that the persons concerned were allowed a limited opportunity to comment on a possible requalification on appeal, no violation was found in a particular case, since it did not "alter the description of events, but only changed the legal characterisation of the offence".[847]

3.2.2. Article 6(3)(b) ECHR

With reference to the right "to have adequate time and facilities for the preparation of his defence",[848] the ECtHR has, in the context of appellate proceedings, mainly considered whether the reasoning provided by a court has sufficiently enabled applicants to seek recourse to a higher court. In this regard, it has found that courts must "indicate with sufficient clarity the grounds on which they based their decision" and that "this, inter alia, […] makes it possible for the accused to exercise usefully the rights of appeal available to him".[849] This right, thus, reveals an overlap with the right of access to a court.[850]

Violations of this provision have arisen when the provision of limited reasoning in an oral hearing, coupled with the absence of the timely deliverance of a written judgment, has constrained the rights of appeal of the persons concerned.[851] Subsequently, the ECtHR has found that, even assuming that a judgment had been read out in full at first instance, "not being able to consult a judgment when preparing for an appeal against it could considerably undermine the effectiveness of such an appeal", which occasioned a violation of Article 6(3)(b) ECHR.[852] However, a judgment rendered in abridged form need not be contrary to this safeguard, as such. The ECtHR has held that a judgment contained sufficient information to

[845] Ibid., at 32.
[846] Ibid., at 32-33.
[847] Judgment, *Bäckström & Andersson v. Sweden*, Application No. 67930/01, ECtHR, 5 September 2006, at 10.
[848] The ECtHR has assessed these matters in conjunction with Article 6(1) ECHR, but, for the sake of clarity, only the most specific legal basis will be mentioned in this respect.
[849] Judgment, *Hadjianastassiou v. Greece*, Application No. 12945/87, ECtHR, 16 December 1992, at 33.
[850] Part II, Chapter 3.1.1.
[851] E.g., Judgment, *Hadjianastassiou v. Greece*, Application No. 12945/87, ECtHR, 16 December 1992, at 34-37; Judgment, *Baucher v. France*, Application No. 53640/00, ECtHR, 24 July 2007, at 43-51.
[852] Judgment, *Chorniy v. Ukraine*, Application No. 35227/06, ECtHR, 16 May 2013, at 42-43.

make an informed assessment of the possible outcome of any appeal, considering that the arguments of the applicant had been addressed, the applicant's conviction was not based on issues unaddressed in the abridged judgment, and the relevant appellate procedure involved a reestablishment of the facts and a reassessment of the law.[853]

3.2.3. Article 6(3)(c) ECHR

Article 6(3)(c) ECHR protects the defendant's right to "[t]o defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

The plain wording of this right concerns, first and foremost, the right to legal assistance. In the context of appellate proceedings, the ECtHR has concluded that this provision has been breached in relation to the conduct of appellate proceedings without legal representation.[854] Furthermore, according to the ECtHR, an absconder should not have been deprived of the right to legal assistance, since, in relation to the second-instance appellate proceedings, "his only chance of having arguments of law and fact presented at second instance in respect of the charge against him" was taken away from him and, in respect of the third-instance appellate proceedings, "the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society" was highlighted.[855] A similar outcome has been reached regarding the refusal of legal aid for the purpose of instituting an appeal, usually following an assessment of the nature of the proceedings, the powers of the appellate court, the complexity of the issues involved, the ability of the applicant to represent himself or herself, and/or the importance of the issues at stake.[856] In addition, breaches of this provision have been found in respect of the inadequacy of court-appointed legal assistance, such as with regard to declaring an appeal inadmissible on the basis that it "contained no submissions and did not indicate in what way the legal provisions whose breach it alleged should have been interpreted and

[853] Judgment, *Zoon v. the Netherlands*, Application No. 29202/95, ECtHR, 7 December 2000, at 46-51.
[854] E.g., Judgment, *Pakelli v. Germany*, Application No. 8398/78, ECtHR, 25 April 1983, at 36-41; Judgment, *Eduard Rozhkov v. Russia*, Application No. 11469/05, ECtHR, 31 October 2013, at 21-26; Judgment, *Khodzhayev v. Russia*, Application No. 21049/06, ECtHR, 12 November 2015, at 85-89.
[855] Judgment, *Poitrimol v. France*, Application No. 14032/88, ECtHR, 23 November 1993, at 35, 38.
[856] E.g., Judgment, *Granger v. the United Kingdom*, Application No. 11932/86, ECtHR, 28 March 1990, at 42-48; Judgment, *Boner v. the United Kingdom*, Application No 18711/91, ECtHR, 28 October 1994, at 38-44; Judgment, *Twalib v. Greece*, Application No. 24294/94, ECtHR, 9 June 1998, at 51-57; Judgment, *Krylov v. Russia*, Application No. 36697/0, ECtHR, 14 March 2013, at 42-49; Judgment, *Shekhov v. Russia*, Application No. 12440/04, ECtHR, 19 June 2014, at 40-46; Judgment, *Volkov & Adamskiy v. Russia*, Applications Nos. 7614/09 & 30863/10, ECtHR, 26 March 2015, at 56-61; Judgment, *Shumikhin v. Russia*, Application No. 7848/06, ECtHR, 16 July 2015, at 23.

applied"[857] or the failure to lodge an appeal and/or to appear at the appellate hearing.[858] Finally, the ECtHR has indicated that the right to self-representation may be limited on appeal. Thus, the obligatory requirement of legal representation by counsel on appeal need not infringe the right to defend oneself in person.[859]

Furthermore, the ECtHR has held that, "[a]lthough this is not expressly mentioned in paragraph 1 of Article 6 […] [ECHR], the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing" and "it is difficult to see how he could exercise […] [the rights guaranteed by Article 6(3)(c), (d), and (e) ECHR] without being present".[860] Whereas the presence of the accused has been mentioned in respect of the adversarial principle, the right to equality of arms, and the right to a public hearing under Article 6(1) ECHR too,[861] it has, most specifically, been addressed under the heading of "the right to defend himself in person" set forth in Article 6(3)(c) ECHR.[862] According to the ECtHR, "the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing […] as it does for the trial hearing […]" and, consequently, "regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it".[863] However, an "appellate court cannot examine the case properly without having heard the applicant directly and gaining a personal impression of him" where it: (i) "has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence"; (ii) "is called upon to examine whether the applicant's sentence should be increased and when the appeal proceedings are capable of raising issues including such matters as the applicant's personality and character, which makes such proceedings of crucial importance for the applicant since their outcome could be of major detriment to him".[864] Findings of non-violation have mainly been entered in respect

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[857] Judgment, *Czekalla v. Portugal*, Application No. 38830/97, ECtHR, 10 October 2002, at 28, 65-66, 68.
[858] E.g., Judgment, *Siyrak v. Russia*, Application No. 38094/05, ECtHR, 19 December 2013, at 29-33; Judgment, *Vamvakas v. Greece (No. 2)*, Application No. 2870/11, ECtHR, 9 April 2015, at 38-43.
[859] Judgment, *Meftah v. France*, Application No. 32911/96, ECtHR, 26 April 2001, at 47.
[860] Judgment, *Colozza v. Italy*, Application No. 9024/80, ECtHR, 12 February 1985, at 27.
[861] Part II, Chapter 3.1.1; Part II, Chapter 3.1.2.
[862] The ECtHR has assessed these matters in conjunction with Article 6(1) ECHR, but, for the sake of clarity, only the most specific legal basis will be mentioned in this respect.
[863] Judgment, *Zahirović v. Croatia*, Application No. 58590/11, ECtHR, 25 April 2013, at 54-55.
[864] Ibid., at 56-57. E.g., Judgment, *Kremzow v. Austria*, Application No. 12350/86, ECtHR, 21 September 1993, at 67-69; Judgment, *Cooke v. Austria*, Application No. 25878/94, ECtHR, 8 February 2000, at 42-44; Judgment, *Sibgatullin v. Russia*, Application No. 32165/02, ECtHR, 23 April 2009, at 39-50; Judgment, *Talabér v.*

of the absence of persons from appellate proceedings not involving a reassessment of factual matters combined with legal representation,[865] including in leave to appeal proceedings[866].

Finally, the ECtHR has ascribed a wider function to Article 6(3)(c) ECHR in the context of leave to appeal proceedings. Whereas it had found, in an assessment of the overall fairness of such proceedings, that Article 6 ECHR had not been breached because, *inter alia,* "a full and thorough evaluation of the relevant factors" had been carried out,[867] it subsequently expanded this line of reasoning. It considered Article 6(3)(c) ECHR violated as, following *in absentia* proceedings at first instance*,* "the denial of leave to appeal […] [was] not […] based on a full and thorough evaluation of the relevant factors", since a ground of appeal put forward by the applicant was dismissed as implausible, even though the information was part of the official record and the appellate court ought, thus, to have been aware thereof.[868]

3.2.4. Article 6(3)(d) ECHR

The right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" mainly "enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument". [869] This definition, thus, reveals a clear overlap with several aforementioned aspects of the right to a fair trial, such as the rights to adversarial proceedings, [870] a public hearing, [871] and to defend oneself in person. [872] Moreover,

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Hungary, Application No. 37376/05, ECtHR, 29 September 2009, at 28-30; Judgment, *Popa & Tănăsescu v. Romania*, Application No. 19946/04, ECtHR, 10 April 2012, at 48-55; Judgment, *Abdulgadirov v. Azerbaijan*, Application No. 24510/06, ECtHR, 20 June 2013, at 41-48; Judgment, *Henri Rivière et al. v. France*, Application No. 46460/10, ECtHR, 25 July 2013, at 28-34; Judgment, *Kozlitin v. Russia*, Application No. 17092/04, ECtHR, 14 November 2013, at 58-73; Judgment, *Lonić v. Croatia*, Application No. 8067/12, ECtHR, 4 December 2014, at 94-102.

[865] E.g., Judgment, *Kamasinski v. Austria*, Application No. 9783/82, ECtHR, 19 December 1989 at 107-108; Judgment, *Kremzow v. Austria*, Application No. 12350/86, ECtHR, 21 September 1993, at 63; Judgment, *Umnikov v. Ukraine*, Application No. 42684/06, ECtHR, 19 May 2016, at 60-61.

[866] E.g., Judgment, *Monnell & Morris v. the United Kingdom*, Applications Nos. 9562/81 & 9818/82, ECtHR, 2 March 1987, at 66-68; Judgment, *E.M. v. Norway*, Application No. 20087/92, ECmHR, 26 October 1995, at 2; Judgment, *Peterson Sarpsborg As et al. v. Norway*, Application No. 25944/94, ECmHR, 27 November 1996, at 2.

[867] E.g., Judgment, *Monnell & Morris v. the United Kingdom*, Applications Nos. 9562/81 & 9818/82, ECtHR, 2 March 1987, at 69; Judgment, *E.M. v. Norway*, Application No. 20087/92, ECmHR, 26 October 1995, at 2; Judgment, *Peterson Sarpsborg As et al. v. Norway*, Application No. 25944/94, ECmHR, 27 November 1996, at 2.

[868] Judgment, *Lalmahomed v. the Netherlands*, Application No. 26036/08, ECtHR, 22 February 2011, at 41-48.

[869] Judgment, *Al-Khawaja & Tahery v. the United Kingdom*, Applications Nos. 26766/05 & 22228/06, ECtHR, 15 December 2011, at 118.

[870] Part II, Chapter 3.1.1.

"[e]xceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him".[873]

The Strasbourg organs have, in general, held that it cannot be excluded "that situations may occur where the appeal proceedings before a court with jurisdiction as to both the facts and the law require that an accused's guilt or innocence could only, as a matter of fair trial, be properly determined with a direct assessment of the evidence given by a witness, namely where the crucial question concerns the credibility of the person involved".[874] However, in appellate proceedings, this guarantee mainly comes into play in relation to the need for additional witness examination in the context of appellate reversals of first instance acquittals. In these circumstances, the ECtHR initially found, without further specification, that Article 6 ECHR had been violated because "both appellate courts [pronouncing a conviction] had very limited additional evidence at their disposal in comparison with the court of first instance that had pronounced an acquittal and the second appellate court had provided no reasons for an implicit rejection of a request by the applicant to hear additional witnesses".[875] Subsequently, it found violations of Article 6(3)(d) ECHR where applicants had been found guilty on appeal on the basis of the same witness statements that underlay acquittals entered by lower instances without rehearing these witnesses on appeal in spite of explicit requests to this effect by the defendants concerned.[876] However, no violation of Article 6(3)(d) ECHR arises in the absence of a specific request to this end and provided that sufficient safeguards have been put in place, such as the possibility to examine witnesses at first instance, the provision of thorough reasoning, and the facility of further appellate review.[877]

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[871] Part II, Chapter 3.1.2.
[872] Part II, Chapter 3.2.3.
[873] Judgment, *Al-Khawaja & Tahery v. the United Kingdom*, Applications Nos. 26766/05 & 22228/06, ECtHR, 15 December 2011, at 118.
[874] Judgment, *Einarsson v. Iceland*, Application No. 22596/93, ECmHR, 5 April 1995, at 2.
[875] Judgment, *Vidal v. Belgium*, Application No. 12351/86, ECtHR, 22 April 1992, at 8-20, 34-35.
[876] E.g., Judgment, *Destrehem v. France*, Application No. 56651/00, ECtHR, 18 May 2004, at 46-47; Judgment, *Dănilă v. Romania*, Application No. 53897/00, ECtHR, 8 March 2007, at 60-63.
[877] Judgment, *Kashlev v. Estonia*, Application No. 22574/08, ECtHR, 26 April 2016, at 51.

3.3. Article 2 Protocol 7 ECHR

3.3.1. Convicted Persons

In light of the reference to those "convicted of a criminal offence", Article 2(1) Protocol 7 ECHR removes the protection of the right to appeal from proceedings of a non-criminal nature[878] and from criminal proceedings concluded without a formal conviction.[879]

Although the use of "shall have the right" may, similar to the ICCPR, suggest mandatory appellate review in criminal cases, the ECtHR has determined that this is not the case. On the basis of the same reasoning set forth in respect of the right of access to a court,[880] the right to appeal may be waived because of, for instance, a plea-bargaining arrangement.[881]

3.3.2. Availability of Appellate Review

In line with its primary rationale, violations have been found in cases in which the right to appeal of persons convicted at first instance has been removed altogether,[882] whereas the opposite conclusion has been reached where a conviction has been reviewed.[883]

The Strasbourg organs have also assessed whether, in the absence of regular appellate relief, alternative mechanisms satisfy the requirements of Article 2 Protocol 7 ECHR. For instance, a review procedure that "could only be initiated by a prosecutor or by a motion of the president of the higher court" was "not a sufficiently effective remedy" for the purposes of the ECHR as it "was not directly accessible to a party to the proceedings and did not depend on his or her motion and arguments".[884] The ECtHR added that "the mere fact that the review initiated by the Prosecutor's Office had some positive, albeit temporary, impact on the applicant's

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[878] E.g., Judgment, *Sjöö v. Sweden*, Application No. 37604/97, ECmHR, 21 October 1998, at 2.
[879] E.g., Judgment, *T.A. v. Sweden*, Application No. 15513/89, ECmHR, 29 June 1992, at 2; Judgment, *Settarov v. Ukraine*, Application No. 1798/03, ECtHR, 16 March 2010, at 1.
[880] Part II, Chapter 3.1.1.
[881] E.g., Judgment, *Natsvlishvili & Togonidze v. Georgia*, Application No. 9043/05, ECtHR, 29 April 2014, at 92-98.
[882] E.g., Judgment, *Grecu v. Romania*, Application No. 75101/01, ECtHR, 30 November 2006, at 83-84.
[883] E.g., Judgment, *C.P.H. v. Sweden*, Application No. 20959/92, ECtHR, 2 September 1994, at 3; Judgment, *Lantto v. Finland*, Application No. 27665/95, ECtHR, 12 July 1999, at 2; Judgment, *De Lorenzo v. Italy*, Application No. 69264/01, ECtHR, 12 February 2004, at 4.
[884] E.g., Judgment, *Gurepka v. Ukraine*, Application No. 61406/00, ECtHR, 6 September 2005, at 60. Similar: Judgment, *Zaicevs v. Latvia*, Application No. 65022/01, ECtHR, 31 July 2007, at 54; Judgment, *Kamburov v. Bulgaria*, Application No. 31001/02, ECtHR, 23 April 2009, at 24; Judgment, *Stanchev v. Bulgaria*, Application No. 8682/02, ECtHR, 1 October 2009, at 46; Judgment, *Zhelyazkov v. Bulgaria*, Application No. 11332/04, ECtHR, 9 October 2012, at 43-44.

situation […] was not in itself sufficient to conclude that the extraordinary appeal was an effective remedy".[885] Similarly, a comparable procedure has been rejected because, in addition to the discretion bestowed on judicial officers to seek review, it lacked "any clearly defined procedure or time-limits and consistent application".[886]

3.3.3. Exercise of the Right to Appeal

The Explanatory Report to Protocol 7 ECHR explicates that Article 2 Protocol 7 ECHR "leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law".[887] These issues will be discussed in turn.

3.3.3.1. Modalities

Notwithstanding the leeway afforded to States signatories, the ECtHR has established limits as to the permissible modalities of appellate review. In this regard, a parallel between the right of access to a court and the right to appeal has been drawn: "any restrictions [to the right to appeal] […] must, by analogy with the right of access to a court embodied in Article 6 § 1 […] [ECHR], pursue a legitimate aim and not infringe the very essence of that right".[888] On this basis, several conditions attached to appellate review have been declared incompatible with Article 2 Protocol 7 ECHR, such as: the exclusion from the appellate process of those who refused or were unable to surrender to the authorities;[889] the appellate review of a decision after a first instance sentence had been served in full;[890] and, following the expiry of the sentence imposed at first instance, the unspecified extension of detention as a result of the exercise of the right to appeal the conviction.[891]

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[885] Judgment, *Gurepka v. Ukraine*, Application No. 61406/00, ECtHR, 6 September 2005, at 61.
[886] Judgment, *Galstyan v. Armenia*, Application No. 26986/03, ECtHR, 15 November 2007, at 125-126. E.g., Judgment, *Karapetyan v. Armenia*, Application No. 22387/05, ECtHR, 27 October 2009, at 73-74; Judgment, *Ashughyan v. Armenia*, Application No. 33268/03, ECtHR, 17 July 2008, at 108-109; Judgment, *Mkhitaryan v. Armenia*, Application No. 22390/05, ECtHR, 2 December 2008, at 85-86; Judgment, *Tadevosyan v. Armenia*, Application No. 41698/04, ECtHR, 2 December 2008, at 79-80; Judgment, *Hakobyan et al. v. Armenia*, Application No. 34320/04, ECtHR, 10 April 2012, at 140-141. Similar: Judgment, *Kakabadze et al. v. Georgia*, Application No. 1484/07, ECtHR, 2 October 2012, at 97.
[887] Council of Europe, Explanatory Report Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 17, 22 November 1984, at 18 (emphasis in original).
[888] E.g., Judgment, *Krombach v. France*, Application No. 29731/96, ECtHR, 13 February 2001, at 96; Judgment, *Gurepka v. Ukraine*, Application No. 61406/00, ECtHR, 6 September 2005, at 59.
[889] E.g., Judgment, *Krombach v. France*, Application No. 29731/96, ECtHR, 13 February 2001, at 100; Judgment, *Mariani v. France*, Application No. 43640/98, ECtHR, 31 March 2005, at 45-46.
[890] E.g., Judgment, *Shvydka v. Ukraine*, Application No. 17888/12, ECtHR, 30 October 2014, at 53-55.
[891] E.g., Judgment, *Yakovenko v. Ukraine*, Application No. 5425/11, ECtHR, 4 June 2015, at 80-83.

Moreover, the ECtHR has determined that the concept of law in the ECHR "implies qualitative requirements, notably those of accessibility and foreseeability", although a degree of generality is accepted.[892] Although the ECtHR has not found so in the context of Article 2 Protocol 7 ECHR, the reference to "law" necessarily prompts these requirements too.

3.3.3.2. Scope of Appellate Review

As with the ICCPR, the scope of appellate review required under Protocol 7 ECHR extends, on the one hand, to the question of whether both conviction and sentence must be reviewed and, on the other hand, whether appellate review must encompass factual matters as well.

As to the former issue, contrary to the ICCPR, Article 2 Protocol 7 ECHR mentions "conviction or sentence". As put by the ECmHR, the use of "conviction or sentence" could, on the one hand, "be understood to imply that the States under this provision have a choice and may limit the review guaranteed for everyone either to concern the sentence alone or conviction and sentence" or, on the other hand, "as referring to the possible choice by the individual concerned".[893] However, subsequently, the ECmHR explicitly discarded any additional discretion on the part of the States. It found that the Explanatory Report to Protocol 7 ECHR merely mentions an example of a guilty plea, implying a lack of choice on the part of the State, and, in addition, that a margin of discretion in the regulation of the appellate process is expressly foreseen by the use of "governed by law", which excludes additional discretion inherent in the disjunctive formulation of "conviction or sentence".[894]

As to the latter issue, in light of the fact that European appellate systems vary in scope, ranging from appellate review limited to questions of law to appellate review encompassing both questions of fact and law, the Explanatory Report to Protocol 7 ECHR also leaves the grounds on which the right to be appal may be exercised to the discretion of Member States of the Council of Europe. In its early decisions, the ECmHR has demonstrated a degree of caution in respect of this matter, finding that it did not consider it "necessary to determine the

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[892] Judgment, *Del Río Prada v. Spain*, Application No. 42750/09, ECtHR, 21 October 2013, at 91-92; Judgment, *Coëme et al. v. Belgium*, Applications Nos. 32492/96, 32547/96, 32548/96, 33209/96, & 33210/96, ECtHR, 22 June 2000, at 145.
[893] Judgment, *Nielsen v. Denmark*, Application No. 19028/91, ECmHR, 9 September 1992, at 2; Judgment, *Jakobsen v. Denmark*, Application No. 22015/93, ECmHR, 30 November 1994, at 2.
[894] Judgment, *Nielsen v. Denmark*, Application No. 19028/91, ECmHR, 9 September 1992, at 2; Judgment, *Jakobsen v. Denmark*, Application No. 22015/93, ECmHR, 30 November 1994, at 2. Also: S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 367-368.

scope of Article 2 of Protocol No. 7 […] [ECHR] in general" and that, "[a]ssuming that a review within the meaning of this provision guarantees to everyone the right to bring before a higher tribunal his conviction or sentence or both such examination by this tribunal may be a limited review, provided the limitations under the law would not make such a review meaningless."[895] Subsequently, however, the Strasbourg organs have, on numerous occasions, declared appellate review limited to a control of the application of the law, procedural defects, and/or the arbitrariness of the inferior judgment, compatible with Article 2 Protocol 7 ECHR.[896] In addition, they have clarified that a refusal by an appellate court to take further evidence, despite the legal prerogative to do so, does not necessarily entail a violation of this provision either.[897] The ECtHR has also specified that a complaint alleging that the appellate court concurring with the reasoning of a lower court denied adequate appellate review did "not disclose any appearance of a violation".[898] Furthermore, in the context of an increased sentence imposed on appeal, appellate review limited to issues of procedure and sentence has been deemed satisfactory.[899] Despite the rather clear language in the Explanatory Report, certain States have appended specific reservations to Protocol 7 ECHR to emphasise the possibility of appellate review confined to matters of law.[900]

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[895] E.g., Judgment, *Nielsen v. Denmark*, Application No. 19028/91, ECmHR, 9 September 1992; Judgment, *Jakobsen v. Denmark*, Application No. 22015/93, ECmHR, 30 November 1994; Judgment, *Altieri v. France*, Cyprus, and Switzerland, Application No. 28140/95, ECtHR, 15 May 1996; Judgment, *Planka v. Austria*, Application No. 25852/94, ECmHR, 15 May 1996.

[896] E.g., Judgment, *N.W. v. Luxemburg*, Application No. 19715/92, ECmHR, 8 December 1992, at 3; Judgment, *Nielsen v. Denmark*, Application No. 19028/91, ECmHR, 9 September 1992; Judgment, *Jakobsen v. Denmark*, Application No. 22015/93, ECmHR, 30 November 1994; Judgment, *Saussier v. France*, Application No. 35884/97, ECmHR, 20 May 1998; Judgment, *Emmanuello v. Italy*, Application No. 35791/97, ECtHR, 31 August 1999, at 11; Judgment, *Pesti & Frodl v. Austria*, Application No. 27618/95, ECtHR, 18 January 2000, at 12; Judgment, *Loewenguth v. France*, Application No. 53183/99, ECtHR, 30 May 2000, at 2; Judgment, *Deperrois v. France*, Application No. 48203/99, ECtHR, 22 June 2000, at 5; Judgment, *Krombach v. France*, Application No. 29731/96, ECtHR, 13 February 2001, at 97; Judgment, *Waridel v. Switzerland*, Application No. 39765/98, ECtHR, 12 April 2001, at 11; Judgment, *Hannak v. Austria*, Application No. 70883/01, ECtHR, 9 July 2001, at 3; Judgment, *I.H. et al. v. Austria*, Application No. 42780/98, ECtHR, 23 October 2001, at 8; Judgment, *Guala v. France*, Application No. 64117/00, ECtHR, 18 March 2003, at 4; Judgment, *De Lorenzo v. Italy*, Application No. 69264/01, ECtHR, 12 February 2004, at 4; Judgment, *Müller v. Austria*, Application No. 12555/03, ECtHR, 5 October 2006, at 25; Judgment, *Hauser-Sporn v. Austria*, Application No. 37301/03, ECtHR, 7 December 2006, at 52; Judgment, *Vitzthum v. Austria*, Application No. 8140/04, ECtHR, 26 July 2007, at 35. The same conclusion has been reached in relation to Article 6(1) ECHR. E.g., Judgment, *Taxquet v. Belgium*, Application No. 926/05, ECtHR, 13 January 2009, at 83; Judgment, *Lhermitte v. Belgium*, Application No. 34238/09, ECtHR, 26 May 2015, at 45.

[897] Judgment, *Dür v. Austria*, Application No. 22342/93, ECmHR, 16 January 1996, at 3.

[898] Judgment, *Kibermanis v. Latvia*, Application No. 42065/06, ECtHR, 17 January 2012, at 41, 47.

[899] Judgment, *Pesti & Frodl v. Austria*, Application No. 27618/95, ECtHR, 18 January 2000, at 4.

[900] Reservations by: France ("The Government of the French Republic declares that, in accordance with the meaning of Article 2, paragraph 1 [Protocol 7 ECHR], the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court") and Germany ("The Federal Republic of Germany applies Article 2.1 [Protocol 7 ECHR] to convictions or sentences in the first instance only, it being possible to restrict review to errors in law …"). Available at:

Seeing that various Member States of the Council of Europe operate appellate proceedings requiring leave to appeal, the Explanatory Report to Protocol 7 ECHR separately addresses the scope of review required in such procedures. It indicates that "[t]he right to apply to a tribunal or an administrative authority for leave to appeal is itself to be regarded as a form of review within the meaning of" Article 2 Protocol 7 ECHR,[901] which entails that the mere fact that leave to appeal must be sought is not in breach of the scope of review required under this provision. Accordingly, cases involving leave to appeal procedures have been decided in accordance with this interpretation.[902] Moreover, the jurisprudence of the ECtHR has added that a refusal by an appellate court to deal with a complaint, in full or in part, may be equated with a decision given on an application for leave to appeal in certain circumstances.[903]

3.3.4. First Instance Trial by Highest Tribunal

The situation addressed by the second exception to the right to appeal envisaged by Article 2 Protocol 7 ECHR had already been addressed prior to the entry into force of this Protocol. The ECmHR has found no violation in respect of a first instance trial involving high-ranking officials and non-dignitaries before the highest domestic court without the possibility of appeal, since Article 6 ECHR does not guarantee such a right.[904] Subsequently, an exception to the right to appeal "in cases in which the person concerned was tried in the first instance by the highest tribunal" was expressly included in Article 2(2) Protocol 7 ECHR, although this provision has not been applied directly in Strasbourg jurisprudence hitherto.

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http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=8&DF=16/05/2013&CL=ENG&VL=1.

[901] Council of Europe, Explanatory Report Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 17, 22 November 1984, at 19.

[902] E.g., Judgment, *Näss v. Sweden*, Application No. 18066/91, ECmHR, 6 April 1994, at 2; Judgment, *C.P.H. v. Sweden*, Application No. 20959/92, ECtHR, 2 September 1994, at 3; Judgment, *E.M. v. Norway*, Application No. 20087/92, ECmHR, 26 October 1995; Judgment, *Peterson Sarpsborg As et al. v. Norway*, Application No. 25944/94, ECmHR, 27 November 1996, at 3; Judgment, *Lantto v. Finland*, Application No. 27665/95, ECtHR, 12 July 1999, at 14-15.

[903] E.g., Judgment, *Hauser v. Austria*, Application No. 26808/95, ECmHR, 16 January 1996; Judgment, *H.S. v. Austria*, Application No. 26510/95, ECmHR, 28 February 1996, at 1; Judgment, *Horst v. Austria*, Application No. 25809/94, ECmHR, 28 February 1996; Judgment, *Hubner v. Austria*, Application No. 34311/96, ECtHR, 31 August 1999, at 5-6; Judgment, *Weh & Weh v. Austria*, Application No. 38544/97, ECtHR, 4 July 2002, at 13; Judgment, *Hauser-Sporn v. Austria*, Application No. 37301/03, ECtHR, 7 December 2006, at 52; Judgment, *Stempfer v. Austria*, Application No. 18294/03, ECtHR, 26 July 2007, at 49-51.

[904] Judgment, *Crociani et al. v. Italy*, Application No. 8603/79, ECmHR, 18 December 1980, para 16-17.

3.3.5. Appellate Conviction Revoking Acquittal

Article 2(2) Protocol 7 ECHR sets forth that the right to appeal may be subject to an exception "in cases in which the person concerned […] was convicted following an appeal against acquittal". Several states have, nevertheless, attached corresponding reservations to Protocol 7 ECHR.[905] Accordingly, the Strasbourg organs have dismissed such complaints straightforwardly. The ECmHR has applied this exception to a conviction imposed by a court of second and final instance following a first instance acquittal, notwithstanding the argument that the exception was inapplicable as the second instance was "competent to examine only points of law and alleged procedural errors".[906] Similarly, it has also invoked this exception in relation to an appellate conviction rendered *in absentia* after a first instance acquittal had been pronounced *in absentia*.[907] However, this exception has not been strictly limited to convictions replacing acquittals. The ECtHR has clarified that it also covers the appellate aggravation of a lower conviction following a fresh hearing on appeal.[908]

4. ACHR

The IACtHR has applied aspects of Article 8(2) ACHR beyond Article 8(2)(h) ACHR to appellate proceedings. Like the Strasbourg organs, it has declared that, "from first to last instance, a criminal proceeding is a single proceeding in various stages" and "the principle of due process […] must be observed in all the various procedural instances".[909]

4.1. Article 8(1) ACHR

As is the case with Article 14(1) ICCPR and Article 6(1) ECHR, Article 8(1) ACHR commences with a general clause. It stipulates that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law". However, in comparison with its counterparts in the ICCPR and ECHR, Article 8(1) ACHR is of a more limited scope. Most pertinently, it lacks a

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[905] Reservations by: Germany ("The Federal Republic of Germany applies Article 2.1 [Protocol 7 ECHR] to convictions or sentences in the first instance only") and the Netherlands ("The Netherlands Government interprets paragraph 1 of Article 2 [Protocol 7 ECHR] thus that the right conferred to everyone convicted of a criminal offence to have conviction or sentence reviewed by a higher tribunal relates only to convictions or sentences given in the first instance by tribunals which, according to Netherlands law, are in charge of jurisdiction in criminal matters"). Available at: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=8&DF=16/05/2013&CL=ENG&VL=1.

[906] Decision, *Botten v. Norway*, Application No. 16206/90, ECmHR, 17 January 1994.

[907] Decision, *Partouche v. France*, Application No. 25906/94, ECmHR, 17 May 1995.

[908] Decision, *Šimšić v. Bosnia and Herzegovina*, Application No. 51552/10, ECtHR, 10 April 2012, at 28.

[909] Judgment, *Castillo Petruzzi et al. v. Peru*, Series C. No. 59, IACtHR, 30 May 1999, at 161.

general clause guaranteeing a fair trial. Accordingly, the jurisprudence of the IACtHR in respect of appellate proceedings has been confined to the impartiality requirement. The definition of this requirement has been explicitly adopted from the ECtHR.[910]

On this basis, the IACtHR has considered the involvement of the same judges in different stages of a criminal trial. In this regard, it has noted that judges who had allowed an appeal against an acquittal, ruling that "[t]he bases of the judgment are not sufficient to reasonably discard the presence of actual or possible malice (with regard to the crimes charged)", were the very same judges who had examined the merits of this person's appeal against conviction upon retrial and "did not confine themselves to the reasons of law".[911] These judges, thus, "did not meet the impartiality requirement", in violation of Article 8(1) IACHR.[912]

4.2. Article 8(2) ACHR

Although the minimum guarantees applicable to criminal proceedings in Article 8(2) ACHR have not arisen frequently in the jurisprudence of the Inter-American bodies in relation to appellate proceedings (except for the right to appeal), the rights to "prior notification in detail […] of the charges"[913] and "to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel", as set forth in Article 8(2)(b) and 8(2)(e) ACHR, have been invoked.

4.2.1. Article 8(2)(b) ACHR

In relation to the dismissal by two military instances of charges against a person and the subsequent conviction by a military court of third instance to life imprisonment and the denial of a special appeal seeking review of that conviction,[914] the IACtHR has found a violation of Article 8(2)(b) ACHR. It held, *inter alia,* that the applicant had been convicted "in the court of last instance, based on new evidence that his defense attorney had not seen".[915]

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[910] Judgment, *Herrera-Ulloa v. Costa Rica*, Series C. No. 106, IACtHR, 2 July 2004, at 170. Also: Part II, Chapter 3.1.3.
[911] Judgment, *Herrera-Ulloa v. Costa Rica*, Series C. No. 106, IACtHR, 2 July 2004, at 174.
[912] Ibid., at 175.
[913] This right has been invoked in conjunction with Article 8(2)(c) ACHR, which enshrines the right to "adequate time and means for the preparation of his defense".
[914] Judgment, *Castillo Petruzzi et al. v. Peru*, Series C. No. 59, IACtHR, 30 May 1999, at 86.21-86.26.
[915] Ibid., at 140.

4.2.2. Article 8(2)(e) ACHR

The IACmHR has found that the refusal to assign legal aid to a person convicted at first instance for the purpose of preparing an appeal may simultaneously violate Article 8(2)(e) and 8(2)(h) ACHR. In this regard, it noted that the petitioner in question was the subject of serious proceedings, the issues of potential pertinence on appeal involved substantively and procedurally complex issues of fact and law, and two relevant matters had not even been raised on appeal.[916] Accordingly, the lack of counsel on appeal contravened "the inalienable right to be assisted by counsel provided by the state", as it "affected the fairness of the proceedings against […] [the petitioner] by hindering his ability to effectively raise and argue serious deficiencies in the proceedings against him".[917] Moreover the IACmHR concluded that the absence of counsel affected the applicant's "right to a fair hearing before the Court of Appeal and therefore undermined his right to appeal his judgment to a higher court".[918]

4.3. Article 8(2)(h) ACHR

In respect of the right to appeal, "considering that the […] [ACHR] must be interpreted taking into account is object and purpose, which is the effective protection of human rights, the […] [IACtHR] has determined that it must be an ordinary, accessible and effective remedy that permits a comprehensive review or examination of the appealed ruling, that is available to anyone who has been convicted, and that observes basic procedural guarantees".[919]

4.3.1. Ordinary

As to the requirement of "ordinary", the IACtHR has specified that "the right to file an appeal against the judgment must be guaranteed before the judgment becomes *res judicata*, because it seeks to protect the right of defense by avoiding the adoption of a final decision in flawed proceedings involving errors that unduly prejudice the interests of an individual".[920]

On this basis, the IACtHR has, for instance, declared the possibility of applying for review, which is "a special remedy that is appropriate against final judgments in certain circumstances", incompatible with the need for an "ordinary" appellate mechanism.[921]

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[916] Report, *Tracey v. Jamaica*, Report No. 61/06, IACmHR, 20 July 2006, at 41.
[917] Ibid., at 42.
[918] Ibid., at 42.
[919] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270.
[920] Ibid., at 270.
[921] Judgment, *Mendoza et al. v. Argentina*, Series C. No. 260, IACtHR, 14 May 2013, at 260.

4.3.2. Accessible

According to the IACtHR, the requirement of "accessible" ensures that "the filing of the appeal should not be so complex that it makes this right illusory", which means that "[t]he formalities for its admission must be minimal and should not constitute an obstacle for the remedy to comply with its purpose of examining and deciding the errors claimed".[922]

4.3.3. Effective

An "effective" appeal requires that, "[r]egardless of the appeal regime or system adopted […] and the name given to the means of contesting the adverse judgment, it must constitute an appropriate mechanism to rectify an erroneous conviction".[923]

It appears, however, that an overlap with the requirement of "ordinary" has arisen in the jurisprudence of the IACtHR. It has concluded that a right to appeal had been "created when the conviction had already become *res judicata*" and that "the possibility to file an appeal […] against a penalty that had already been served meant nothing more than the mere formal existence of the process of appeal because the effects of the judgment had already materialized".[924] Although this language is identical to the definition of "ordinary",[925] the IACtHR has concluded that this remedy was "neither adequate nor effective".[926]

Moreover, although it does not directly arise out of the general description of the requirement of "effective", the IACtHR has assessed the provision of adequate reasoning by appellate courts on this basis. In this regard, it has found that "[t]he simple description of the lower court's arguments, without the higher court that decided the appeal setting out its own reasoning […], means that the latter did not comply with the requirement of an effective remedy".[927] Similarly, in relation to a finding that "permitted evidence that the appellants considered relevant to support their defense not to be assessed" and that merely indicated "the

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[922] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270. In similar terms, the IACtHR previously considered that, as Article 8(2)(h) IACHR seeks to enable a party to "turn to a higher court for revision of a judgment that was unfavorable to that party's interests", States possess "a margin of discretion in regulating the exercise of that remedy … [but] they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment". See: Judgment, *Barreto Leiva v. Venezuela*, Series C. No. 206, IACtHR, 17 November 2009, at 90.
[923] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270.
[924] Judgment, *Alibux v. Suriname*, Series C. No. 276, IACtHR, 30 January 2014, at 110.
[925] Part II, Chapter 4.3.1.
[926] Judgment, *Alibux v. Suriname*, Series C. No. 276, IACtHR, 30 January 2014, at 110.
[927] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 279.

reasons why it was 'rejected'", the IACtHR emphasised that an appellate court "must ensure that the guilty verdict provides clear, complete and logical grounds in which, in addition to describing the content of the evidence, it sets out its assessment of this and indicates the reasons why it considered – or did not consider – it reliable and appropriate to prove the elements of criminal responsibility".[928]

4.3.4. Comprehensive Review

The requirement of "effective" "is closely related to" the requirement of "[a]llowing a comprehensive review or examination of the judgment appealed".[929]

4.3.4.1. The Judgment

Contrary to the ICCPR and Protocol 7 ECHR, Article 8(2)(h) ACHR does not specify whether the conviction and/or the sentence must be reviewed on appeal, but refers only to "the judgment". However, the generic wording of this provision appears to encompass both the conviction and the sentence imposed by a lower court. Moreover, although not stated in relation to the scope of appellate review, the IACtHR has clarified that the right to appeal must be "[a]vailable to anyone who has been *sentenced and convicted*".[930] This reference further supports the interpretation of "the judgment" as encompassing both components.

4.3.4.2. Factual, Probative, and Legal Issues

As stated by the IACtHR, an appellate remedy "must permit an analysis of the factual, probative and legal issues on which the contested judgment was based because, in jurisdictional activities, the determination of the facts and the application of the law are interdependent, so that an erroneous determination of the facts entails an erroneous or inappropriate application of the law".[931] On this basis, the IACtHR has found that appellate proceedings limited to the following matters run afoul of the right to appeal: (i) control of the observation or misapplication of "some principle of the law" by the inferior court and the impossibility of introducing evidence to "prove whether or not the crime was committed";[932] (ii) an assessment of "issues relating to the validity of a law, treaty, or constitutional provision, or the arbitrariness of a judgment, factual and evidentiary issues, as well as those of

[928] Ibid., at 288.
[929] Ibid., at 270.
[930] Ibid., at 270 (emphasis in original). Also: Part II, Chapter 4.3.5.
[931] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270.
[932] Judgment, *Herrera-Ulloa v. Costa Rica*, Series C. No. 107, IACtHR, 2 July 2004, at 150, 152, 167.

a non-constitutional legal nature";[933] (iii) a review of the "erroneous application of the substantive law to the facts of the case, and […] violation of any of the procedural rules", which makes "it impossible for a higher court to review matters of fact and/or evidence";[934] and (iv) an evaluation of "whether the judgment […] was sufficient in itself; whether it had made an appropriate assessment of the evidence on which its conclusions were founded, and whether it indicated the reasons why it rejected the evidence that had not been assessed, *without reviewing the facts that were established therein*".[935]

The IACtHR has ascribed a wide reach to this aspect of Article 8(2)(h) ACHR. After finding a violation of the obligation to ensure a comprehensive review on appeal, it also held that it was not "necessary to issue an additional ruling on the alleged violation of the rights to defense, the right to be heard, the duty to substantiate the decision and the right to a simple and prompt remedy".[936] In this regard, it noted that "the alleged damages […] are encompassed within the violation of the right to appeal the judgment", since "[i]t was precisely the absence of a comprehensive integrated appeal under the terms of Article 8(2)(h) […] [ACHR], which would have guaranteed the possibility of challenging the conviction in second instance".[937] It has further specified that "the failure to guarantee the right to appeal the judgment prevents the exercise of the right to defense […] and implies the lack of protection of other basic guarantees of due process that must be assured to the appellant, as applicable, so that a higher judge or court may rule on the grievances argued".[938] However, despite the lack of a need to rule separately on "the duty to substantiate the decision", the IACtHR, subsequently, separately considered this matter with reference to the requirement of "effective" after finding a violation of the obligation to provide comprehensive review.[939]

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[933] Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 103-111, 113.
[934] Judgment, *Mendoza et al. v. Argentina*, Series C. No. 260, IACtHR, 14 May 2013, at 253, 256, 257.
[935] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 283 (emphasis in original). However, the appellate framework, as such, did not make it impossible "to contest matters relating to the factual framework of the judgment by examining the assessment of the evidence in it". See: Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 297.
[936] Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 120.
[937] Ibid., at 119.
[938] Ibid., at 120.
[939] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 288. Also: Part II, Chapter 4.3.4.

4.3.5. Anyone Sentenced and Convicted

With regard to the need to ensure that appellate review is "available to anyone who has been sentenced and convicted", the IACtHR has found that "[i]t must be ensured even to the individual who has been sentenced in a judgment that revokes an acquittal".[940] According to the IACtHR, this right "assists the convicted person", in respect of which it has invoked Article 14(5) ICCPR, "which, in referring to the right to appeal the judgment, expressly states that this is a guarantee of '[e]veryone *convicted* of a crime'" and is "'very similar' to Article 8(2)(h)" ACHR.[941] It has also rejected the applicability of the exception foreseen in Article 2(2) Protocol 7 ECHR, since the ACHR does not provide for such exceptions.[942] However, the specific violation found in this situation was not that the second-instance conviction imposed after a first instance acquittal could not be appealed, but that, as mentioned, the remedies against the second-instance decision did not allow for comprehensive review.[943]

Moreover, although not mentioned in the general description of this aspect of the right to appeal, both the IACmHR[944] and the IACtHR[945] have confirmed that trial by the highest court sitting in first instance without additional appellate avenues falls short of Article 8(2)(h) ACHR. In this regard, the IACtHR has engaged in comparative research of the procedural constructs adopted by ACHR Member States, in respect of which it has concluded that "the majority of the State Parties […] allow high-ranking officials the possibility to appeal the judgment in the context of criminal proceedings".[946] This conclusion was supported with an acceptance of the relevant interpretation provided by the HRC and a rejection of the possibility of applying an exception by analogy to Article 2(2) Protocol 7 ECHR.[947] Furthermore, the IACtHR has noted that a first instance trial before the highest domestic court need not necessarily infringe the right to appeal, provided that a remedy is available, such as "when the plenary or a chamber within the same superior body, but of a different composition […], decides the appeal filed with powers to revoke or amend the judgment of conviction".[948]

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[940] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270.
[941] Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 92 (emphasis in original).
[942] Ibid., at 95.
[943] Ibid., at 103-111, 113.
[944] Report, *Figueredo Planchart v. Bolivia*, Report No. 50/00, IACmHR, 13 April 2000, at 100-101, 130-131.
[945] Judgment, *Barreto Leiva v. Venezuela*, Series C. No. 206, IACtHR, 17 November 2009, at 75-81, 83-87, 91; Judgment, *Alibux v. Suriname*, Series C. No. 276, IACtHR, 30 January 2014, at 103-104.
[946] Judgment, *Alibux v. Suriname*, Series C. No. 276, IACtHR, 30 January 2014, at 99.
[947] Ibid., at 90-96.
[948] Ibid., at 105. Also: Judgment, *Barreto Leiva v. Venezuela*, Series C. No. 206, IACtHR, 17 November 2009, at 90.

4.3.6. Minimal Procedural Guarantees

The final component of Article 8(2)(h) ACHR identified by the IACtHR is that "appeal regimes must respect the minimum procedural guarantees that, pursuant to Article 8 of the […] [ACHR], are pertinent and necessary to decide the errors asserted by the appellant, without this entailing the need to conduct a new oral trial".[949] Considering that the findings as to the aforementioned violations of Article 8(2)(b) and 8(2)(e) ACHR had been adopted prior to this pronouncement,[950] there are no specific examples of the application of the need to respect minimum procedural guarantees on appeal.

However, preceding observations made by the IACmHR on the basis of the views of the HRC may serve to illustrate this aspect of the IACtHR jurisprudence. In this regard, the IACmHR has found that, in relation to "the opportunity to have the full acts of the file, including trial acts in the case of oral systems", and "access to adequate counsel", "the right to appeal the judgment is part of the body of procedural guarantees that ensures the due process of law, which are inextricably interlinked" and this right must, therefore, "be interpreted together with other procedural guarantees if the characteristics of the case require it".[951]

5. Synthesis

This chapter will systematise the similarities and dissimilarities between the different conceptions of the right to appeal and associated fair trial guarantees in international human rights law. In light of the diversity of legal bases relied on by human rights monitoring bodies and courts, the relevant norms have been mired in ambiguity. However, a reversal of the analysis, which adopts the subject matter evaluated by the HRC, ECtHR, and IACtHR (as opposed to the legal basis) as the point of departure, yields a more well-defined assessment. On the basis of the output of the human rights monitoring bodies and courts, these matters may be structured as follows: (i) the essence of the right to appeal; (ii) the bearer of the right to appeal; (iii) the regulation of appellate machineries; and (iv) the conduct of appellate proceedings. Subsequently, the similarities and/or dissimilarities will be explained.

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[949] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270.
[950] Part II, Chapter 4.2.
[951] Report, *Mohamed v. Argentina*, Report No. 173/10, IACmHR, 2 November 2010, at 95; Report, *Mendoza et al. v. Argentina*, Report No. 172/10, IACmHR, 2 November 2010, at 193.

5.1. Similarities and Dissimilarities

5.1.1. Essence of the Right to Appeal

The essential function of the right to appeal revolves around the question whether or not appellate structures have been put in place. Closely associated matters have also arisen in the views of the HRC and the jurisprudence of the ECtHR and IACtHR. These concern the adequacy of alternative mechanisms, exceptions to the right to appeal, and the remit of the essence of the right to appeal as encompassing either single-level or multi-level review.

5.1.1.1. Availability of Appellate Recourse

The right to appeal in all three human rights instruments seeks to ensure, first and foremost, the availability of appellate recourse, so as to provide a forum for the review of a first instance decision.[952] This may appear an obvious conclusion. However, especially in the case of Article 14(5) ICCPR and Article 2 Protocol 7 ECHR, it is not. Both provisions stipulate that this right is to be exercised according to (or governed by) domestic law. Shortly after the adoption of the ICCPR, it has, therefore, been suggested that, alike the ECHR, "it is possible that that text does not guarantee an appeal in every case either". This is because "[t]he right is to 'a review by a higher tribunal according to law' and this was understood by one delegate in the Third Committee of the General Assembly to mean that the right related to national standards so that […] all that is guaranteed is the availability of whatever right of appeal, if any, exists in each State 'according to law'".[953] However, the HRC and ECtHR have explicitly dismissed such an interpretation.[954] Accordingly, the complete inexistence of appellate structures for persons convicted at first instance has been declared at odds with the essential function of the rights to appeal contained in the ICCPR and Protocol 7 ECHR.[955] Although the IACtHR has not been confronted with the complete absence of appellate review, its rejection of the exceptions to the right to appeal in cases in which a person was convicted by the highest domestic court sitting in first instance and following an appeal from an acquittal establishes the same conclusion regarding Article 8(2)(h) ACHR.[956]

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[952] Part II, Chapter 2.3.2; Part II, Chapter 3.3.2; Part II, Chapter 4.3.5. Also: Part II, Chapter 1.1.
[953] D. Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', 16(2) *International & Comparative Law Quarterly* 352 (1967), at 372.
[954] Part II, Chapter 2.3.3; Part II, Chapter 3.3.3.1; Part II, Chapter 5.1.3.
[955] Part II, Chapter 2.3.2; Part II, Chapter 3.3.2.
[956] Part II, Chapter 4.3.5.

5.1.1.2. Alternatives to Appellate Review

The HRC, ECtHR, and IACtHR have dealt with alternative mechanisms to appellate review in a similar manner, insofar as this matter has arisen in their views and jurisprudence. Appellate review contingent upon the exercise of discretionary powers by judicial officers, as opposed to an automatic right to appeal at the disposal of the person concerned, falls short of the essence of Article 14(5) ICCPR and Article 2 Protocol 7 ECHR.[957] Similarly, both the HRC and the IACtHR have found that the possibility of applying for a review of a conviction based on newly discovered evidence is an inadequate substitute for appellate review.[958]

5.1.1.3. Exceptions to the Right to Appeal

Although the human rights monitoring bodies and courts have dealt with the exceptions to the right to appeal to differing degrees, three such exceptions may be distinguished. These are: (i) trial by the highest domestic court sitting in first instance; (ii) an appellate conviction pronounced in lieu of an acquittal without further appellate review; and (iii) and an aggravated sentence imposed on appeal in the absence of further appellate remedies.

5.1.1.3.1. First Instance Trial by Highest Court

A clear discrepancy exists, between, on the one hand, the HRC and the IACtHR, and, on the other hand, the ECtHR in respect of the necessity of a right to appeal in cases in which a person has been tried and convicted by the highest domestic court sitting in first instance. The application of Article 2 Protocol 7 ECHR has been explicitly limited in such situations.[959] Even though this exception has not been applied in practice, the ECtHR may be expected to do so straightforwardly, considering the provision's plain wording and the analogous precedent developed in respect of Article 6(1) ECHR.[960] Conversely, in light of the unrestricted nature of Article 14(5) ICCPR and Article 8(2)(h) ACHR, the HRC and the IACtHR have specifically disallowed trials by the highest domestic courts sitting in first instance without the possibility of further appellate review, barring a reservation.[961]

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[957] Part II, Chapter 2.3.2; Part II, Chapter 3.3.2.
[958] Part II, Chapter 2.3.2; Part II, Chapter 4.3.1.
[959] Article 2(2) Protocol 7 ECHR.
[960] Part II, Chapter 3.3.4.
[961] Part II, Chapter 2.3.5; Part II, Chapter 4.3.5.

5.1.1.3.2. Appellate Conviction Revoking Acquittal

The various conceptions of the right to appeal also diverge in respect of convictions imposed on appeal in lieu of an acquittal without the possibility of further appellate review. Such a state of affairs has been declared contrary to both Article 14(5) ICCPR and Article 8(2)(h) ACHR.[962] In this regard, it has been emphasised that the right to appeal has been afforded to convicted persons. Thus, where a person has been acquitted, the right to appeal remains dormant. Its protection is only activated once the person concerned has been actually declared guilty, regardless of the judicial instance first imposing a conviction.

On the contrary, Protocol 7 ECHR further restricts the protection of the right to appeal in these circumstances and the ECtHR has explicitly invoked this exemption.[963] Although its rationale has not been set forth,[964] it appears to be premised on the notion that review by two judicial levels provides sufficient safeguards against arbitrary convictions, irrespective of the judicial instance first pronouncing the person concerned guilty or the unavailability of further appellate review. Nevertheless, even though Article 2 Protocol 7 ECHR espouses a decreased degree of protection regarding this facet of appellate proceedings in comparison with Article 14(5) ICCPR and Article 8(2)(h) ACHR, the ECtHR has demanded two safeguards in this context. First, where the same evidence that underlay an acquittal at first instance produces an unreviewable conviction on appeal, the person concerned and/or witnesses testifying at first instance must be reheard pursuant to the right to a public hearing under Article 6(1) ECHR.[965] A very similar conclusion has been reached in respect of the right to examine, or have examined, witnesses on appeal under Article 6(3)(d) ECHR.[966] Second, where an appellate court requalifies the legal or factual basis of an acquittal and proceeds to impose a conviction without offering the person concerned sufficient opportunity to defend himself or herself or to have further appellate recourse, a violation of the right to be informed of the charges ensues on the basis of Article 6(3)(a) ECHR.[967]

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[962] Part II, Chapter 2.3.5; Part II, Chapter 4.3.5.
[963] Part II, Chapter 3.3.5.
[964] Council of Europe, Explanatory Report Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 17, 22 November 1984, at 20.
[965] Part II, Chapter 3.1.1.
[966] Part II, Chapter 3.2.4.
[967] Part II, Chapter 3.2.1.

5.1.1.3.3. Aggravated Appellate Sentence

Despite the preceding divergence, Article 14(5) ICCPR and Article 2(2) Protocol 7 ECHR approximate each other in respect of a variation of this aspect of the right to appeal.[968] The ECtHR has, along the lines of the aforementioned exception to the right to appeal, determined that Article 2(2) Protocol 7 ECHR also covers the appellate aggravation of a lower conviction, including an increased sentence.[969] However, contrary to its views on the substitution of acquittals for final convictions, the HRC has excluded the application of Article 14(5) ICCPR in relation to appellate confirmations of inferior convictions accompanied with aggravated sentences, unless "the essential characterization of the offence" has been modified.[970]

Its reasoning was not particularly convincing, however. First, the HRC advanced that many domestic systems allow for appellate aggravation of sentences.[971] Yet, as indicated by a dissenting member of the HRC,[972] many jurisdictions also allow for an appellate conviction to replace an inferior acquittal but, in that context, the existence of domestic practice did not preclude the HRC from finding Article 14(5) ICCPR violated due to the absence of further appellate review.[973] Second, besides the unproblematic finding that an appellate increase of a sentence arising out of the correction of a miscalculation of the applicable term of imprisonment does not amount to a modification of the essential characterisation of an offence,[974] the conclusion that the appellate recharacterisation of a person as a principal and not an accessory does not do so either, as it would reflect a diverging appreciation of the seriousness of the circumstances of the offence, is highly unpersuasive.[975] A modification of the applicable mode of liability arguably transcends a mere assessment of the circumstances of the offence, since an appraisal of dissimilar legal elements and facts may be involved. In the absence of additional guidance, it thus remains unclear what degree of recharacterisation would be required to generate the protection of Article 14(5) ICCPR in these circumstances.

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[968] The IACtHR has not been confronted with this issue in its jurisprudence and its position remains to be elucidated.
[969] Part II, Chapter 3.3.5.
[970] Part II, Chapter 2.3.4.
[971] Views, *Pérez Escolar v. Spain*, Communication No. 1156/2003, HRC, 28 March 2006, at 9.2.
[972] Views, *Gomaríz Valera v. Spain*, Communication No. 1095/2002, HRC, 22 July 2005, Individual Opinion of Committee Member Ms. Ruth Wedgwood.
[973] Part II, Chapter 2.3.4.
[974] Views, *J.A.B.G. v. Spain*, Communication No. 1891/2009, HRC, 29 October 2012, at 8.5.
[975] Views, *Pérez Escolar v. Spain*, Communication No. 1156/2003, HRC, 28 March 2006, at 9.2.

Be that as it may, additional appellate review is, arguably, not required in such a context, considering that Article 14(5) ICCPR "merely establishes the principle of two-level proceedings".[976] Indeed, where a conviction is subject to appellate review, whether as part of an appeal by the accused or as part of a complaint seeking an increased sentence by the prosecutor, the sentence is necessarily part of such a process. The requirements of Article 14(5) ICCPR will, thus, have been fulfilled.

5.1.1.4. Remit of the Right to Appeal

The HRC has determined that the remit of Article 14(5) ICCPR is confined to single level appellate review.[977] Although the ECtHR has not stated so explicitly, Article 2 Protocol 7 ECHR has been applied in an identical matter, since it has held that this provision has not been violated where a conviction has been reviewed by an appellate jurisdiction.[978]

At the same time, however, the HRC has found that, where domestic systems of criminal procedure provide for several instances of appellate review, effective access must be granted to such jurisdictions.[979] Article 8(2)(h) ACHR displays similar characteristics, as it has been interpreted as regulating access to appellate jurisdictions[980] and its application has not been limited to proceedings at first instance.[981] In this regard, it has been remarked that, in comparison with the ECHR, the HRC "has taken a much more liberal approach in interpreting Article 14 § 5 of the ICCPR",[982] which would extend to the IACtHR as well. Such a view, however, overlooks the fact that the Strasbourg organs have, in comparable situations, employed disparate legal bases with an identical outcome. The impossibility of lodging an additional appellate complaint has been addressed under the right of access to a court in particular circumstances.[983] More specifically, exemplifying the close link between the two rights, the ECtHR has held that declaring an appeal on points of law before a court of third

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[976] M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl: N.P. Engel Verlag, 2005), at 351.
[977] Part II, Chapter 2.3.2.
[978] E.g., Judgment, *Saussier v. France*, Application No. 35884/97, ECmHR, 20 May 1998, at 2; Judgment, *Lantto v. Finland*, Application No. 27665/95, ECtHR, 12 July 1999, at 2; Judgment, *De Lorenzo v. Italy*, Application No. 69264/01, ECtHR, 12 February 2004, at 4.
[979] Part II, Chapter 2.3.2; Part II, Chapter 2.3.7.
[980] Part II, Chapter 4.3.2.
[981] Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 89-96.
[982] S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 371.
[983] E.g., Judgment, *Omar v. France*, Application No. 43/1997/827/1033, ECtHR, 29 July 1998, at 40-44; Judgment, *Khalfaoui v. France*, Application No. 34791/97, ECtHR, 14 December 1999, at 40-54; Judgment, *Korgul v. Poland*, Application No. 35916/08, ECtHR, 17 April 2012, at 27-31.

instance inadmissible because of the failure of the person concerned to surrender himself to custody "impairs the very essence of the right of appeal […] on the one hand, and the right of access to the […] [court of third instance] and exercise of the rights of the defence on the other".[984] Furthermore, the aforementioned comparison between the ICCPR and the ECHR refers specifically to the view of the HRC in which the failure by an appellate court to produce reasons was considered to hamper access to additional appellate review.[985] Yet, the ECtHR has specifically reviewed such impediments to additional appellate review too, albeit under Article 6(3)(b) ECHR.[986] Similarly, the impossibility of further appellate recourse due to a lack of legal aid has been assessed under Article 6(3)(c) ECHR.[987]

5.1.2. Bearer of the Right to Appeal

Article 14(5) ICCPR and Article 2 Protocol 7 ECHR explicitly refer to a right to appeal available to "convicted" persons. Accordingly, the HRC and the ECtHR have determined that the right to appeal is not available to those acquitted at first instance.[988] Some doubt may arise as to the formulation of Article 8(2) ACHR, which applies to "every person". However, it may reasonably be read as imposing a similar limitation. Although the IACtHR has not explicitly denied appellate rights to acquitted persons, it has indicatively found that the right to appeal must be "available to anyone who has been convicted".[989] Indeed, whereas an appeal by an acquitted person may serve legitimate purposes, such as disagreement with the reasoning underlying the acquittal, the conferral of a general right of appeal to acquitted persons would demand too much from an instrument setting forth "minimum guarantees". Even so, as indicated by the HRC and ECtHR, the exercise of the right to appeal is not a mandatory affair, considering the possibility of waiving this entitlement.[990]

5.1.3. Regulation of the Appellate Process

Like other stages of a criminal trial, the appellate phase demands regulation. In this respect, the expressions "according to law" in Article 14(5) ICCPR and "shall be governed by law" in Article 2 Protocol 7 ECHR provide States Parties with the discretion to do so. Whereas the

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[984] Judgment, *Guérin v. France*, Application No. 25201/94, ECtHR, 29 July 1998, at 43.
[985] S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 371.
[986] E.g., Judgment, *Hadjianastassiou v. Greece*, Application No. 12945/87, ECtHR, 16 December 1992, at 33-37.
[987] E.g., Judgment, *Twalib v. Greece*, Application No. 24294/94, ECtHR, 9 June 1998, at 51-57.
[988] Part II, Chapter 2.3.2; Part II, Chapter 3.3.2.
[989] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270.
[990] Part II, Chapter 2.3.1; Part II, Chapter 3.1.1; Part II, Chapter 3.3.1. This conclusion extends, by the same logic, to Article 8(2)(h) ACHR.

IACtHR has acknowledged that Article 8(2)(h) ACHR omits the words "according to law",[991] its description of the requirement of "accessible" closely approximates this component of the right to appeal.[992] As noted by the HRC, such regulation, in general, encompasses "the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review".[993] Before addressing the latter component,[994] the limits attaching to this discretion will be set out.

5.1.3.1. Limits of the Discretion

The views of the HRC and the Strasbourg jurisprudence similarly interpret the discretion afforded to States Parties as excluding the facility to remove the right to appeal across the board.[995] Therefore, the claim that "[a]nother difference between the ECHR and the ICCPR is that those responsible for drafting the […] ECHR thought it necessary to add a sentence stressing that the exercise of the right to appeal 'shall be governed by law'" does not withstand scrutiny.[996] The IACtHR similarly held that, "[w]hile States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very essence of the right to appeal".[997]

The HRC and the ECtHR have similarly determined that the references to "law" in the context of other rights in the ICCPR and the ECHR must be, on the one hand, precise/foreseeable to a reasonable degree and, on the other hand, accessible.[998] Accordingly, considering that Article 14(5) ICCPR and Article 2 Protocol 7 ECHR explicitly refer to "law", whilst Article 8(2)(h) ACHR is amenable to regulation as well,[999] these requirements equally apply to the regulation of the modalities of the appellate process.

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[991] Judgment, *Alibux v. Suriname*, Series C. No. 276, IACtHR, 30 January 2014, at 93.
[992] Part II, Chapter 4.3.2.
[993] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 45.
[994] The human rights monitoring bodies and courts have not specifically defined "the modalities by which the review by a higher tribunal is to be carried out". Accordingly, the remaining matters pertaining to appellate proceedings that have arisen in their views and jurisprudence will be addressed in Part II, Chapter 5.1.4.
[995] Part II, Chapter 2.3.3; Part II, Chapter 3.3.3.1.
[996] S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 365.
[997] Judgment, *Herrera-Ulloa v. Costa Rica*, Series C. No. 107, IACtHR, 2 July 2004, at 161.
[998] Part II, Chapter 2.3.3; Part II, Chapter 3.3.3.1.
[999] Judgment, *Herrera-Ulloa v. Costa Rica*, Series C. No. 107, IACtHR, 2 July 2004, at 161.

5.1.3.2. Higher Court

All three provisions concerning the right to appeal require appellate review by a "higher" court,[1000] which appears to introduce a requirement of hierarchical superiority.

However, as has been remarked, "[l]ittle substance is to be found" in this requirement.[1001] Indeed, the HRC, the ECtHR, and the IACtHR have not explicitly addressed this requirement. In addition, there are indications that alternative constructions may satisfy this aspect of the right to appeal. For instance, the ECtHR has found that review provided by a body combining legal advisory functions to the executive branch and judicial functions satisfied Article 2 Protocol 7 ECHR, as it was "competent to deal with all aspects of the case".[1002] The IACtHR has also considered, in relation to trial at first instance before the highest domestic court, that such a situation may be remedied by conducting "the proceedings at first instance […] by the president or of a courtroom of a superior tribunal and [hearing] the appeal […] by the full tribunal, to the exclusion of those who already issued an opinion on the case".[1003] It appears, therefore, that the decisive criterion in this regard is whether the body charged with appellate review has been equipped to ensure review of a sufficient scope,[1004] rather than its formal hierarchical relationship with the court pronouncing the judgment.

5.1.4. Conduct of Appellate Proceedings

The conduct of appellate proceedings has been held to certain minimum standards by all three human rights monitoring bodies, as is implied in the (varying degrees of) application of fair trial guarantees other than the right to appeal to appellate proceedings.

5.1.4.1. Access to Appellate Review

As discussed in the preceding sections, the right to appeal in international human rights law enjoins States who have undertaken such treaty obligations, in essence, to organise their criminal procedure systems in a manner so as to allow those convicted of a criminal offence to have recourse to a higher tribunal for the purpose of a review.[1005] A similar, yet distinct,

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[1000] The issue of the highest domestic courts sitting in first instance is also linked to the division of judicial responsibilities under national law and the substance of the right to appeal in international human rights law. See: Part II, Chapter 5.1.1.3.1.
[1001] S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 368.
[1002] Judgment, *Didier v. France*, Communication No. 58188/00, ECtHR, 27 August 2002, at 3.
[1003] Judgment, *Barreto Leiva v. Venezuela*, Series C. No. 206, IACtHR, 17 November 2009, at 90.
[1004] Also: Part II, Chapter 5.1.4.7.
[1005] Part II, Chapter 5.1.1.1.

matter arises in relation to situations in which appellate structures complying with the essential elements of the right to appeal have been put in place, but appellate review of a first instance conviction has been excluded or hampered for various reasons.

Whilst the monitoring bodies and courts have invoked a multiplicity of legal bases to regulate sufficient access to appellate courts, the views of the HRC and the jurisprudence of the ECtHR and IACtHR reveal substantive overlap, although to varying degrees.[1006] First, the availability of basic documents enabling the effective exercise of appellate rights, in particular a reasoned opinion by a court of first instance, has been linked to the issue of access to an appellate court by the HRC and the ECtHR. The HRC has considered that the provision of such documents is an explicit component of the effective exercise of the right to appeal under Article 14(5) ICCPR.[1007] On the other hand, although the ECtHR has ruled that no separate matter arises under Article 2 Protocol 7 ECHR in relation to this question,[1008] it has assessed it in a nearly indistinguishable manner under Article 6(3)(b) ECHR.[1009] In more specific terms, the ECtHR has considered that the purpose underlying the need for reasoned judgments is, *inter alia*, to allow for the useful exercise of rights of appeal.[1010] A further similarity is that neither Article 14(5) ICCPR nor Article 6(3)(b) ECHR imposes an absolute obligation in this context. Thus, the lack of a written judgment may, under both bases, be compensated for by less elaborate reasoning.[1011] Second, both the ECtHR and the HRC have assessed issues as to time limits applicable to the filing of appellate review. The ECtHR has found that incorrect information as to the time limits for filing an appeal or the effective shortening of such limits

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[1006] In the jurisprudence of the ECtHR, additional issues have been addressed under the right of access to a court under Article 6(1) ECHR and the right to appeal under Article 2 Protocol 7 ECHR. Pursuant to the former legal basis, it has found violations of the right of access to a court concerning the refusal to entertain appeals instituted by absconders, a misunderstanding as to the appellate jurisdiction competent to examine an appeal, and the lack of a voluntary and unequivocal waiver of the right to legal assistance, which served as a precondition for filing an appeal, whereas no transgressions of this right have been found in respect of fines for vexatious appeals and the requirement to be represented by a lawyer on appeal (see: Part II, Chapter 3.1.1). Under the latter legal basis, besides a simultaneous violation concerning the exclusion of appeals by absconders, the ECtHR has separately found a violation of the right to appeal concerning the extension of detention because of the filing of an appeal and because of appellate review of a decision conducted after a sentence had been served (see: Part II, Chapter 3.3.3.1). However, since these matters have not directly arisen in the HRC's views and/or the IACtHR's jurisprudence, they will not be discussed further in this context.
[1007] Part II, Chapter 2.3.7.
[1008] Judgment, *Baucher v. France*, Application No. 53640/00, ECtHR, 24 July 2007, at 43-52.
[1009] Part II, Chapter 3.2.2. The ECtHR has also addressed this issue under the right of access to a court under Article 6(1) ECHR. See: Part II, Chapter 3.1.1.
[1010] Judgment, *Hadjianastassiou v. Greece*, Application No. 12945/87, ECtHR, 16 December 1992, at 33.
[1011] Views, *Bailey v. Jamaica*, Communication No. 709/1996, HRC, 21 July 1999, at 7.4; Judgment, *Zoon v. the Netherlands*, Application No. 29202/95, ECtHR, 7 December 2000, at 46-51.

may contravene the right of access to a court under Article 6(1) ECHR.[1012] Similarly, the HRC has assessed the ineffective provision of information concerning time limits for instituting an appeal, although with reference to the right to "have adequate time and facilities for the preparation of his defence".[1013] Finally, leave to appeal proceedings have not been declared inherently incompatible with the right to appeal by the HRC and the ECtHR.[1014]

5.1.4.2. Orality

Both the HRC and the ECtHR have determined that appellate hearings do not necessarily require public hearings to be conducted on appeal and that, accordingly, a written procedure may suffice.[1015] However, this is not the case for all types of appellate procedures. In this regard, the HRC has, after some indeterminate views, subscribed to the position of the ECtHR that appellate procedures extending to matters of both fact and law and concluding with a determinative assessment as to the question of guilt or innocence do require oral hearings, pursuant to the publicity requirement in Article 14(1) ICCPR and Article 6(1) ECHR.[1016]

5.1.4.3. Impartiality

All three monitoring bodies operate highly similar definitions concerning the general impartiality guarantees contained in Articles 14(1) ICCPR, 6(1) ECHR and 8(1) ACHR,[1017] which invariably disallow the existence of actual bias on the part of judges and the reasonable appearance thereof. Whereas the general impartiality guarantee has not been specifically invoked in respect of appellate judges, there is no reason to discontinue its application in the appellate phase of a case, considering that it applies to judges in general.

In addition, two specific consequences of the general impartiality guarantee have been carved out in respect of appellate proceedings in the views of the HRC and the jurisprudence of the

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[1012] Part II, Chapter 3.1.1.
[1013] Part II, Chapter 2.2.2.
[1014] Part II, Chapter 2.3.6; Part II, Chapter 3.3.3.2. According to both bodies, the remaining aspects of appellate fairness remain applicable to leave to appeal proceedings, albeit in adjusted form. In this respect, the ECtHR has found that the need for a public hearing under Article 6(1) ECHR and the presence of the accused under Article 6(3)(c) ECHR is reduced (see: Part II, Chapter 3.1.2; Part II, Chapter 3.2.3), whereas both the HRC and the ECtHR have found that the extent of reasoning may be more limited under Article 14(5) ICCPR and Article 6(1) ECHR, respectively (see: Part II, Chapter 2.3.6; Part II, Chapter 3.1.1), but that the scope of appellate review required is similar to regular appellate proceedings, pursuant to Article 14(5) ICCPR and Article 6(3)(c) ECHR, respectively (see: Part II, Chapter 2.3.6; Part II, Chapter 3.2.3).
[1015] Part II, Chapter 2.1.2; Part II, Chapter 3.1.2.
[1016] Part II, Chapter 2.1.2; Part II, Chapter 3.1.2.
[1017] Part II, Chapter 2.1.3; Part II, Chapter 3.1.3; Part II, Chapter 4.1.

ECtHR and IACtHR. First, with regard to the accumulation of judicial functions in the appellate and preceding phases in the same case, the thrusts of the pronouncements of the HRC, the ECtHR, and the IACtHR coincide in that, although the recurring involvement of a judge in the same case need not impair the requirement of impartiality, a breach has been found where judges have formed an opinion on the charges, or the evaluation thereof, against appellants.[1018] Second, the ECtHR has added that a violation of the impartiality requirement may also arise in relation to the involvement of the same appellate judge in interrelated cases concerning the same persons, if the judge in question directly assesses the criminal responsibility of these persons in both judgments.[1019] The latter form is, arguably, incompatible with the ICCPR and ACHR as well. It is a variation of the impermissible accumulation of judicial functions in different phases of the same trial, considering that the underlying principle, which denounces the repeated evaluation of the same charges levelled against the same person(s) by the same judge in a manner to allow the judge to form an opinion on the culpability of the person concerned, is identical.

5.1.4.4. Presence

The presence of the accused at appellate hearings has been assessed from two separate angles in the views of the HRC and the jurisprudence of the ECtHR. First, the absence of the accused and the presence of the prosecutorial authorities in appellate proceedings has been found to be in contravention of the right to equality under Article 14(1) ICCPR[1020] and the right to adversarial proceedings under Article 6(1) ECHR[1021]. Second, in close connection with the requirement to hold public hearings,[1022] the HRC and the ECtHR have deduced a more general right of the accused to attend appellate hearings from the analogous guarantees in Article 14(3)(d) ICCPR and Article 6(3)(c) ECHR, where such proceedings concern both matters of law and fact and culminate in a determination as to guilt or innocence.[1023]

5.1.4.5. Information regarding the Accusation

As discussed, the ECHR has found that the right to "be informed promptly […] and in detail […] of the nature and cause of the accusation" may be breached on appeal if, *inter alia,* a

[1018] Part II, Chapter 2.1.3; Part II, Chapter 3.1.3; Part II, Chapter 4.1.
[1019] Part II, Chapter 3.1.3.
[1020] Part II, Chapter 2.1.1.
[1021] Part II, Chapter 3.1.1.
[1022] Part II, Chapter 5.1.4.2.
[1023] Part II, Chapter 2.2.3: Part II, Chapter 3.2.3.

requalification of the legal or factual basis extrinsic to the original charge by an appellate court engenders an unreviewable conviction in favour of an acquittal.[1024] However, the remit of this strand of jurisprudence of the ECtHR is wider. This right may also be violated where such a requalification leads to any type of alteration on appeal, including a diminished degree of culpability or a less serious offence.[1025] Even though it has only considered the appellate aggravation of a first instance conviction, the HRC has espoused a similar understanding. It has considered whether the person concerned had been sufficiently appraised of the appellate modification of the basis upon which first instance proceedings had been conducted.[1026]

5.1.4.6. Appellate Representation

5.1.4.6.1. Legal Assistance

The right to be defended through legal assistance has been applied by both the HRC and the ECtHR in relation to appeal proceedings. In more specific terms, the HRC has denounced the occurrence of appellate proceedings without the accused's counsel present as incompatible with Article 14(3)(d) and/or 14(5) ICCPR,[1027] whereas the ECtHR has found violations of Article 6(3)(c) ECHR in this context[1028]. Furthermore, according to the HRC, the defendant must be informed of his right to request the presence of his lawyer.[1029]

This right also encompasses legal aid for the indigent. All three human rights monitoring bodies and courts have applied this right to appellate proceedings. Despite occasional references to either Article 14(3)(d) ICCPR or Article 14(5) ICCPR in isolation, the HRC has mostly found violations of both provisions taken together where requests for legal aid in respect of the appellate process have been unwarrantedly rejected.[1030] The IACmHR has adopted a nearly identical approach, invoking the corresponding provisions of the ACHR.[1031] Conversely, the Strasbourg bodies have referred to Article 6(3)(c) ECHR.[1032]

[1024] Part II, Chapter 3.2.1.
[1025] Ibid.
[1026] Part II, Chapter 2.2.1.
[1027] Part II, Chapter 2.2.3; Part II, Chapter 2.3.8.
[1028] Part II, Chapter 3.2.3. The ECtHR has added that this right extends to absconders too. However, as it has not been addressed by the HRC, it will not be discussed further.
[1029] Part II, Chapter 2.2.3.
[1030] Part II, Chapter 2.2.3; Part II, Chapter 2.3.8.
[1031] Part II, Chapter 4.2.2.
[1032] Part II, Chapter 3.2.3.

What is more, pursuant to this right, it must be ensured that adequate legal assistance has been provided. The HRC has referred to various legal bases in this respect, namely Article 14(3)(b), 14(3)(d) and 14(5) ICCPR.[1033] On the other hand, the ECtHR has exclusively considered Article 6(3)(c) ECHR in this context[1034] and it has even excluded the application of Article 2 Protocol 7 ECHR.[1035] However, a high threshold has been set by both the HRC and the ECtHR. Violations have only been found if counsel has, either fully or effectively, annulled the convicted person's ability to file an appeal, as evidenced by the findings by the HRC and/or the ECtHR concerning the failure to provide appellate arguments, a concession that an appeal lacks merit, the lack of compliance with formal requirements and the consequent dismissal of an appeal, and the non-appearance at an appellate hearing.[1036] Moreover, the scope of protection offered by this guarantee extends to appointed counsel only, despite some ambiguity. The general reference of the HRC to "the conduct of *a defence lawyer*" suggests that it considers that a court must verify whether the behaviour of both appointed and privately retained counsel is manifestly "incompatible with the interests of justice",[1037] but it has specifically restricted States' responsibility to the conduct of appointed counsel.[1038] The more general position of the ECtHR leans towards the possibility of responsibility for the conduct of privately retained counsel as well,[1039] but it has, hitherto, only found violations of Article 6(3)(c) ECHR for inadequate assistance by appointed counsel on appeal.[1040]

Finally, based on Article 14(3)(d) ICCPR, the HRC has determined that, absent sufficient justification, a violation may ensue if requests to substitute privately retained trial counsel remain unheeded and this counsel continues to represent the accused on appeal.[1041] This matter has not been addressed by the ECtHR and the IACtHR in relation to appellate proceedings, however. Conversely, the right to counsel of one's choice does not apply to counsel appointed under a legal aid scheme. It has been written that, in respect of the ICCPR,

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[1033] Part II, Chapter 2.2.2; Part II, Chapter 2.2.3; Part II, Chapter 2.3.8.
[1034] Part II, Chapter 3.2.3.
[1035] Judgment, *Sannino v. Italy*, Application No. 30961/03, ECtHR, 27 April 2006, at 50-59.
[1036] Part II, Chapter 2.2.2; Part II, Chapter 3.2.3.
[1037] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 32 (emphasis supplied).
[1038] Ibid., at 38. Also: M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel Verlag, 2005), at 341.
[1039] S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 287.
[1040] Part II, Chapter 3.2.3.
[1041] Part II, Chapter 2.2.3.

"in principle accused persons have no influence on the selection of" such counsel,[1042] which extends to appellate proceedings too. Neither the ECtHR nor the IACtHR have addressed this issue in respect of appellate proceedings, but the former is, in general, negatively inclined towards the existence of such a choice.[1043] Nevertheless, it has also found that, "[w]hen appointing defence counsel the national courts must certainly have regard to the defendant's wishes", which may be overridden "when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice".[1044]

5.1.4.6.2. Self-Representation

The right to defend oneself in person in appellate proceedings has not featured in the views of the HRC. However, it has found that, in general, "[t]he interests of justice may […] require the assignment of a lawyer against the wishes of the accused", but any restriction must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice".[1045] The ECtHR, on the other hand, has addressed this matter in a more direct manner in the context of appellate proceedings. It has indicated that the obligatory requirement of (specialised) legal representation by counsel on appeal need not infringe the right to defend oneself in person or the right of access to a court.[1046]

5.1.4.7. Scope of Appellate Review

5.1.4.7.1. Conviction and Sentence

Whereas Article 14(5) ICCPR requires appellate review of "conviction and sentence"[1047] and Article 8(2)(h) ACHR may be interpreted to encompass both aspects as well,[1048] Article 2 Protocol 7 ECHR stipulates that the "conviction or sentence" may be reviewed on appeal.[1049] The wording of the latter standard, thus, suggests a possible limiting effect. However, the practical differences are marginal, at best. As noted, the ECtHR has determined that this aspect does not foresee additional discretion on the part of the States Parties in respect of the

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[1042] M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl: N.P. Engel Verlag, 2005), at 339.
[1043] Judgment, *Franquesa Freixas v. Spain*, Application No. 53590/99, ECtHR, 21 November 2000.
[1044] Judgment, *Croissant v. Germany*, Application No. 13611/88, ECtHR, 25 September 1992, at 29.
[1045] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 37.
[1046] Part II, Chapter 3.1.1; Part II, Chapter 3.2.3.
[1047] Part II, Chapter 2.3.6.
[1048] Part II, Chapter 4.3.4.1.
[1049] Part II, Chapter 3.3.3.1.

right to appeal, but pertains, in the main, to plea-bargaining procedures.[1050] Such a limitation of the scope of appellate review is, thus, primarily inspired by the choice of the person concerned as to a particular procedural construct. However, the HRC has been inspired by similar considerations. It has, indeed, found that review of both components is not obligatory where the person concerned opts to appeal the sentence exclusively.[1051]

5.1.4.7.2. Facts and Law

The international and regional human rights instruments differ in respect of the scope of appellate review required. On the one hand, Articles 14(5) ICCPR and Article 8(2)(h) ACHR have been explicitly interpreted to extend, in one way or another, to appellate review encompassing matters of fact and law.[1052] On the other hand, Article 2 Protocol 7 ECHR merely calls for appellate control of the application of the law.[1053] Even so, the ECtHR has applied another safeguard, i.e. the right to a public hearing under Article 6(1) ECHR.[1054] On this basis, the ECtHR has demanded an assessment of determinative factual matters in appellate proceedings dealing with issues of fact and law and resulting in a determination as to the guilt or innocence of the person concerned.[1055]

5.1.4.8. Reasoned Opinion

In addition to its function as a vehicle securing access to (further) appellate review,[1056] the right to a reasoned opinion has an independent function in appellate proceedings. The accused's right to take cognisance of the reasons advanced in support of the assessment of his guilt or innocence is no less relevant on appeal than at first instance.

Indeed, all three monitoring bodies envisage such an application of the right to a reasoned opinion on appeal. In connection with the obligation to provide appellate review regarding facts and law under Article 14(5) ICCPR, the HRC has referred to the need to provide

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[1050] Ibid.
[1051] Part II, Chapter 2.3.6.
[1052] Part II, Chapter 2.3.6; Part II, Chapter 4.3.4.
[1053] Part II, Chapter 3.3.3.1.
[1054] Part II, Chapter 3.1.2. As noted, the ECtHR has also indicated that the right to examine, or have examined, witnesses may require the rehearing of witnesses on appeal, which could further increase the scope of appellate review. However, as noted, this provision has, in practice, mainly been applied to situations in which a conviction has been imposed on appeal following an appeal from an acquittal. See: Part II, Chapter 3.2.4. It will, therefore, not be assessed further in this context.
[1055] Part II, Chapter 3.1.2.
[1056] Part II, Chapter 5.1.4.1.

sufficient, but not exhaustive, consideration to an appeal.[1057] Although it has only referred to the right to a reasoned opinion in respect of leave to appeal proceedings and not in relation to full-fledged appellate proceedings,[1058] this aspect may be considered to attach to the latter as well. Similar standards apply to both types of proceedings.[1059] The ECtHR has similarly found, on the basis of the reference to the general right to a fair trial in Article 6(1) ECHR, that this right entails the need to provide "meaningful consideration" to determinative matters, whereas more limited reasoning may be compensated by safeguards.[1060] On the other hand, the IACtHR has required "clear, *complete* and logical grounds" to be set out by an appellate court,[1061] which appears to constitute a more demanding threshold.

5.1.4.9. Public Pronouncement of the Judgment

The ECtHR has determined that appellate judgments need not necessarily be pronounced publicly, as long as other means of publication are available.[1062] However, neither the HRC nor the IACtHR has clarified the extent of this aspect of the ICCPR and ACHR, respectively, regarding appellate proceedings. Even so, the ECtHR has adopted its interpretation of Article 6(1) ECHR despite an observation that the wording of this provision, which sets forth that "[j]udgment shall be pronounced publicly", would "appear to be stricter in this respect than Article 14 para. 1 of the […] [ICCPR], which provides that the judgment 'shall be made public'".[1063] Indeed, the expression "shall be made public" in Article 14(1) ICCPR appears, on a plain reading, to allow for alternative forms of publication. Accordingly, the interpretation of Article 6(1) ECtHR falls in line with the wording of Article 14(1) ICCPR.

5.2. The Similarities Explained

At first sight, the explicit and implicit divergences between international and regional approaches to the right to appeal and associated fair trial guarantees applicable to appellate proceedings appear insurmountable. Nevertheless, the preceding discussion has revealed, in general, that the commonalities outweigh the dissimilarities in respect of the approaches to appellate fairness espoused by the human rights monitoring bodies and courts. Aside from particular aspects, distinct components of appellate proceedings have either been addressed in

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[1057] Part II, Chapter 2.3.6.
[1058] Ibid.
[1059] E.g., Part II, Chapter 2.3.9; Part II, Chapter 3.3.3.2.
[1060] Part II, Chapter 3.1.1.
[1061] Part II, Chapter 4.3.3.
[1062] Part II, Chapter 3.1.4.
[1063] Judgment, *Sutter v. Switzerland*, Application No. 8209/78, ECtHR, 22 February 1984, at 32.

a similar manner or the various approaches diverge less than may appear when the different taxonomies and legal bases employed by the monitoring bodies and courts are set aside.

This development may be explained on the basis of two observations. First, the human rights monitoring bodies and courts have applied dissimilar methodologies to the assessment of the fairness of appellate proceedings. Whereas the HRC and the IACtHR have interpreted the right to appeal as the primary norm controlling appellate fairness, the ECtHR has stressed the continued application of the remaining fair trial norms in appellate proceedings and has employed the right to appeal as a supplementary norm. These methodologies have emphasised diverging legal bases, but have, even so, yielded similar results on the merits. Second, an ongoing process of convergence concerning standards of appellate fairness has been set in motion in the views of the HRC and the jurisprudence of the ECtHR and IACtHR.

5.2.1. Diverging Methodologies

With regard to the methodologies concerning the assessment of appellate fairness, it has been proposed that "[t]he protection afforded by ICCPR, Article 14(5) and Article 2, Protocol No. 7 [ECHR], focuses on the fairness of the appeal itself" and that "[t]his 'fair trial' is not the same as the 'fair trial' of ICCPR, Article 14(1) and ECHR, Article 6(1), which were originally intended to apply to the merits of the case in the (original) trial: it is a separate notion, 'which does […] depend on the special features of the proceedings involved'".[1064]

Article 14(5) ICCPR, and by extension Article 8(2)(h) ACHR, are indeed concerned with the "fairness of the appeal itself". The views of the HRC establish, in the aggregate, that the former provision extends beyond the principal role of the right to appeal to guarantee review of a conviction by a higher court.[1065] Instead, it also regulates many associated facets of appellate proceedings, such as the required scope of appellate review, the conditions for the effective exercise of the right to appeal, the legal assistance afforded to appellants, and their

[1064] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1540-1541. In the original text, the final part of this sentence reads: "[…] which does not depend on the special features of the proceedings involved". However, this appears to be an error, since the jurisprudence referred to by the authors states that "[t]he manner of application of Article 6 […] [ECHR] to proceedings before courts of appeal does […] depend on the special features of the proceedings involved". See: Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 27.
[1065] Part II, Chapter 2.3.5.

presence at appellate hearings.[1066] The extensive remit of Article 14(5) ICCPR simultaneously entails that the remaining fair trial guarantees of Article 14 ICCPR have been assigned reduced significance in appellate proceedings. In addition to the fact that these guarantees have been invoked less frequently in relation to such proceedings, most of them lack a sufficient degree of independent application. In this regard, they have either been applied in conjunction with Article 14(5) ICCPR[1067] or have displayed an overlap with aspects of the latter provision[1068]. The right to appeal may be characterised in similar terms in the Inter-American human rights system. Article 8(2)(h) ACHR encompasses numerous aspects of appellate proceedings,[1069] whereas the remaining fair trial guarantees have been invoked to a more limited degree.[1070] In sum, these conceptions of the right to appeal amount, in their own right, to miniature fair trial provisions in the context of appellate proceedings.

However, the aforementioned portrayal of Article 2 Protocol 7 ECHR as focusing on the fairness of the appeal itself overstretches this provision. Based on the jurisprudence of the Strasbourg organs, it has been afforded a more reduced scope of application. Considering that Article 6 ECHR has been invoked in respect of the majority of issues of fairness in appellate proceedings,[1071] Article 2 Protocol 7 ECHR has been necessarily reduced to its primary function, namely the provision of an appellate remedy, as such.[1072] The relationship between these rights is exemplified by two characteristics of the Strasbourg jurisprudence. First, in the application of the guarantees contained in Article 6 ECHR to appellate proceedings, the Strasbourg organs have explicitly determined that the right to appeal was at stake. For example, discussing the right of access to a court under Article 6(1) ECHR, the ECtHR has held that declaring an appeal inadmissible because the appellant had not surrendered to custody "impairs the very essence of the right of appeal"[1073] and that "the right to have one's conviction reviewed cannot be considered effective unless the arguments of the appellant […] are duly examined".[1074] Second, it is even more telling that the Strasbourg organs have prioritised assessments under Article 6 ECHR over Article 2 Protocol 7 ECHR in relation to various issues. For instance, a finding of a violation of Article 6(1) ECHR for the

[1066] Part II, Chapter 2.3.6; Part II, Chapter 2.3.8; Part II, Chapter 2.3.10.
[1067] E.g., Part II, Chapter 2.2.2; Part II, Chapter 2.2.3; Part II, Chapter 2.2.4.
[1068] E.g., Part II, Chapter 2.1.1; Part II, Chapter 2.1.2.
[1069] Part II, Chapter 4.3.
[1070] Part II, Chapter 4.1; Part II, Chapter 4.2.
[1071] Part II, Chapter 3.1; Part II, Chapter 3.2.
[1072] Part II, Chapter 3.3.
[1073] Judgment, *Guérin v. France*, Application No. 25201/94, ECtHR, 29 July 1998, at 43.
[1074] Judgment, *Nedzela v. France*, Application No. 73695/01, ECtHR, 27 July 2006, at 55.

impossibility of accessing an appellate court has been accompanied with a refusal to consider alleged associated violations of Article 2 Protocol 7 ECHR.[1075] An equivalent approach is evident in the finding that the delivery of an oral first instance judgment confined solely to its operative paragraphs, in conjunction with the fact that the written version was only made available subsequent to the expiration of the deadline for the filing of an appeal, violated Article 6(3)(b) ECHR and that no separate question arose under Article 2 Protocol 7 ECHR.[1076] Similarly, the absence of an accused person from an appellate hearing was only considered under paragraphs (c) and (d) of Article 6(3) ECHR and not under Article 2 Protocol 7 ECHR.[1077] Accordingly, Article 2 Protocol 7 ECHR primarily supplements the continued application of Article 6 ECHR by ensuring an appellate remedy, as such.

The diverging methodologies of, on the one hand, the HRC and the ACHR and, on the other hand, the ECtHR result mainly from the dissimilar processes of inception of the rights to appeal. This right was conceived of as part of the right to a fair trial in the ICCPR and ACHR from the outset.[1078] In such a construction, the right to appeal is naturally brought into play to exclusively or conjointly regulate the majority of issues of fairness arising on appeal. Consequently, the realm of application of the remainder of the fair trial guarantees contained in Article 14 ICCPR and Article 8 ACHR has been relegated to secondary importance in respect of appellate proceedings. On the other hand, Article 2 Protocol 7 ECHR was inserted into a pre-existing, although not fully developed, edifice of fair trial norms applicable to appellate proceedings.[1079] In these circumstances, Protocol 7 ECHR was, thus, pre-ordained to elicit a limited scope of operation, in view of the dominant role of Article 6 ECHR.

5.2.2. Tendencies of Convergence

Notwithstanding their divergent methodologies, the human rights monitoring bodies and courts have invariably applied fair trial guarantees other than the right to appeal to appellate proceedings, albeit to varying degrees. On this basis, the views and jurisprudence of the monitoring bodies reveal tendencies of convergence in respect of their assessments of

[1075] Judgment, *Papon v. France*, Application No. 54210/00, ECtHR, 25 July 2002, at 95-106.
[1076] Judgment, *Baucher v. France*, Application No. 53640/00, ECtHR, 24 July 2007, at 51-52.
[1077] Judgment, *Umnikov v. Ukraine*, Application No. 42684/06, ECtHR, 19 May 2016, at 56.
[1078] Part II, Chapter 1.1.
[1079] Ibid.

appellate proceedings. This process is, arguably, an outgrowth of increased "transjudicial communication", which entails "communication among courts […] across borders".[1080]

It has been noted that "[s]upranational courts […] engage in horizontal communication, as evidenced […] by direct citation".[1081] For instance, it has been remarked that the ECHR "is the most highly developed scheme of international human rights protection" and that "the influence of Strasbourg can […] be seen in the work of the Human Rights Committee", including on "the concept of 'equality of arms' and the obligation to provide the accused with guarantees of his rights which are effective".[1082] Such communication has also occurred in respect of standards of appellate fairness. Most significantly, relying on an ECtHR precedent, the HRC has found that, as an appellate court "had to examine the case as to the facts and the law, and in particular had to make a full assessment of the question of the author's guilt or innocence, it should have used its power to conduct hearings" when imposing convictions on additional counts on appeal.[1083] This is even though it had previously considered that "the absence of oral hearings in the appellate proceedings … [raises] no issue under article 14" ICCPR.[1084] The ECtHR has referred to the approach of the HRC in relation to a particular component of appellate fairness in even more explicit terms. It has held that, because a Member State had not ratified Protocol 7 ECHR, it was prevented from "subjecting the law governing the […] system to scrutiny similar in nature and scope to that of the" HRC.[1085] Nevertheless, the ECtHR continued by holding that "[i]t remains to be decided whether the requirements of Article 6" ECHR had been met.[1086] In this regard, it has, ultimately, concluded that the decision was not "based on a full and thorough evaluation of the relevant factors" under Articles 6(1) and 6(3)(c) ECHR.[1087] Even though it had claimed that it was prevented from reviewing the matter in a manner similar to the HRC, its conclusion was highly comparable, since the latter had found, in relation to the same domestic system, that

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[1080] A-M Slaughter, 'A Typology of Transjudicial Communication', 29(1) *University of Richmond Law Review* 99 (1994), at 101. This phenomenon has also been described as "judicial globalization". See: A-M Slaughter, 'Judicial Globalization', 40(4) *Virginia Journal of International Law* 1103 (1999-2000).
[1081] A-M Slaughter, 'A Typology of Transjudicial Communication', 29(1) *University of Richmond Law Review* 99 (1994), at 105.
[1082] J. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 1993), at 18-19.
[1083] Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 7.8 (footnote 55), referring to: Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 33.
[1084] Views, *R.M. v. Finland*, Communication No. 301/1988, HRC, 23 March 1989, at 6.4. Also: Views, *Jessop v. New Zealand*, Communication No. 1758/2008, HRC, 29 March 2011, at 8.7.
[1085] Judgment, *Lalmahomed v. the Netherlands*, Application No. 26036/08, ECtHR, 22 February 2011, at 37.
[1086] Ibid., at 38.
[1087] Ibid., at 47-48.

the motivation provided by a judge was "inadequate and insufficient", as it, *inter alia,* did not reveal that it took into consideration "the evidence presented before the first instance judge".[1088] Finally, whereas the IACmHR has also invoked aspects of the ECtHR's jurisprudence on appellate fairness,[1089] the IACtHR has more directly aligned itself with the HRC. It has, in this regard, stated that Article 14(5) ICCPR "is very similar to Article 8(2)(h)" ACHR on a number of occasions.[1090]

Transjudicial communication between supranational courts also occurs by means of "tacit emulation",[1091] which may be taken to signify the implicit adoption of standards set by other bodies. Indeed, traces of ECtHR jurisprudence are clearly distinguishable in the views of the HRC and the jurisprudence of the IACtHR. The former has, for instance, concluded that Article 14(3)(d) ICCPR applies to appellate proceedings, as the appellate court had "examined the case as to the facts and the law and made a new assessment of the issue of guilt or innocence",[1092] and that, in light of a finding that Article 14(3)(d) ICCPR had been violated, it would not "separately examine the author's claims under article 14(5)" ICCPR.[1093] A renewed assessment of guilt or innocence has identically been invoked by the ECtHR as a basis for the application of certain Article 6 ECHR guarantees,[1094] which has repeatedly led to the conclusion that no separate issues under the right to appeal had arisen.[1095] The HRC has also considered the absence of the accused from appellate proceedings under the principle of equality of arms,[1096] which is analogous to the approach of the ECtHR,[1097] even though it has subsequently recognised that this issue may raise issues concerning the right to appeal, as

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[1088] Views, *Mennen v. the Netherlands*, Communication No. 1797/2008, HRC, 27 July 2010, at 8.3.
[1089] E.g., Report, *Mohamed v. Argentina*, Report No. 173/10, IACmHR, 2 November 2010, at 61-63, referring to: Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999. However, the IACmHR has also referred to Article 14(5) ICCPR. It has noted that "[t]he American Convention, in contrast to the European Convention on Human Rights […], provides ample protection of the right to appeal" and that "[t]he language of Article 14.5 of the ICCPR is essentially the same as that of Article 8.2.h of the American Convention, so the U.N. Human Rights Committee's interpretations of the content and scope of that article are relevant as guidelines for interpretation of [Article] 8.2.h of the American Convention".
[1090] Judgment, *Barreto Leiva v. Venezuela*, Series C. No. 206, IACtHR, 17 November 2009, at 87; Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 94. Similar: Judgment, *Alibux v. Suriname*, Series C. No. 276, IACtHR, 30 January 2014, at 90-94.
[1091] A-M Slaughter, 'A Typology of Transjudicial Communication', 29(1) *University of Richmond Law Review* 99 (1994), at 105.
[1092] Views, *Dorofeev v. Russia*, Communication No. 2041/2011, HRC, 11 July 2014, at 10.6. Also: Views, *Y.M. v. Russia*, Communication No. 2059/2011, HRC, 31 March 2016, at 9.6.
[1093] Views, *Y.M. v. Russia*, Communication No. 2059/2011, HRC, 31 March 2016, at 9.8.
[1094] E.g., Part II, Chapter 3.1.2.
[1095] Part II, Chapter 5.2.1.
[1096] Part II, Chapter 2.1.1.
[1097] Part II, Chapter 3.1.1.

such, too[1098]. Furthermore, in the aforementioned case in which the HRC directly referred to the jurisprudence of the ECtHR concerning public hearings on appeal, it has applied a very similar approach to the requirement of impartiality on appeal without invoking ECtHR precedents directly. In this regard, on the basis of the Article 14(1) ICCPR exclusively, it has deemed that the participation of two appellate judges in preliminary proceedings, which "was such as to allow them to form an opinion on the case prior to the […] appeal proceedings" and which was "necessarily related to the charges against the author and the evaluation of those charges", incompatible with the impartiality requirement.[1099] Aside from the unmistakable similarity with the ECtHR approach to such matters,[1100] the HRC omitted to invoke Article 14(5) ICCPR in this context. As to the IACtHR, in addition to its direct association with the HRC in respect of Article 14(5) ICCPR, its jurisprudence also bears some hallmarks of the ECtHR. For instance, in respect of an appellate conviction in final instance on the basis of testimony introduced during these proceedings, after two instances had dismissed the charges for lack of jurisdiction, the IACtHR has found a violation of the rights to "prior notification […] of the charges" and "adequate time and means for the preparation of his defense".[1101] This is nearly identical to the conclusions adopted by the ECtHR in similar circumstances.[1102] In addition, more generally, the IACtHR has found that "appeal regimes must respect the minimum procedural guarantees that, pursuant to Article 8 […] [ACHR], are pertinent and necessary",[1103] which is emblematic for the ECtHR's jurisprudence.[1104]

As with the diverging methodologies, the process of convergence between the approaches of the human rights monitoring bodies and courts is also connected with the atypical origins of the rights to appeal in international human rights law. This process is rooted in the unequal temporal development of the fair trial standards relevant to appellate proceedings. Whereas Article 2 Protocol 7 ECHR became part of an evolving scheme of fair trial norms applicable to appellate proceedings, the development of Article 14(5) ICCPR and Article 8(2)(h) ACHR by the HRC and the IACtHR has been delayed and incomplete.[1105] Therefore, the more

[1098] Part II, Chapter 2.3.10.
[1099] Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 7.9.
[1100] Part II, Chapter 3.1.3.
[1101] Judgment, *Castillo Petruzzi et al. v. Peru*, Series C. No. 59, IACtHR, 30 May 1999, at 135-142.
[1102] Part II, Chapter 3.2.1. Prior to the ECtHR's decision, the HRC had considered a very similar matter with reference to the right to appeal. See: Views, *Kulomin v. Hungary*, Communication No. 521/1992, HRC, 22 March 1996, at 11.7.
[1103] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 270.
[1104] Part II, Chapter 3.2.
[1105] Part II, Chapter 1.1.

elaborate body of principles concerning fair trial standards applicable to appellate proceedings of the Strasbourg organs has become a significant source of reference for corresponding matters of appellate fairness encountered by the HRC and IACtHR. At the same time, this chronology has produced inverse effects too. The preparatory work concerning Protocol 7 ECHR clearly anticipated a more limited conception of the right to appeal,[1106] but, at the relevant time, the HRC had not yet issued its views on Article 14(5) ICCPR.[1107] The extent of the schism between Article 2 Protocol 7 ECHR and Article 14(5) ICCPR has, thus, only become apparent at a later stage. Accordingly, as the HRC's views evolved, the ECtHR has arguably further pushed its interpretation of other fair trial standards applicable to appellate proceedings to diminish the gap between these approaches.[1108]

6. Interim Conclusion: Norms of International Human Rights Law

The belated introduction of the right to appeal in the corpus of fair trial norms, the divergences between the various conceptions of the right to appeal, and the differing legal bases relied upon by human rights monitoring bodies and courts may, at first sight, suggest that norms of international human rights law concerning appellate proceedings have insufficiently matured to be employed as touchstones for the appellate processes of the Ad Hoc Tribunals and the ICC. However, upon closer scrutiny, the preceding analysis dispels this impression. It reveals that, when the interaction between the rights to appeal and the correlating application of other fair trial guarantees is taken into account, international human rights law constitutes an appropriate yardstick in relation to such proceedings. In more specific terms, two such categories of norms and/or approaches may be identified.

6.1. Identical and Unopposed ICCPR Norms or Approaches

The first category consists of, on the one hand, identical norms or approaches espoused by the human rights instruments or human rights monitoring bodies and courts and, on the other hand, norms or approaches promulgated by the ICCPR or the HRC, which are not contradicted by their regional counterparts. Norms and/or approaches to appellate fairness that are common to both international and regional human rights instruments and/or human rights monitoring bodies and courts are comprehensively grounded in international human rights law. On this basis, the appellate proceedings of the Ad Hoc Tribunals and the ICC must

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[1106] Ibid.
[1107] Part II, Chapter 2.3.4; Part II, Chapter 2.3.5; Part II, Chapter 2.3.6.
[1108] Judgment, *Lalmahomed v. the Netherlands*, Application No. 26036/08, ECtHR, 22 February 2011, at 37-48.

comply with such norms. Furthermore, the appellate proceedings of the Ad Hoc Tribunals and the ICC must also abide by ICCPR norms and/or approaches of the HRC concerning appellate fairness that are not in conflict with norms of the regional human rights instruments (Protocol 7 ECHR, ECHR, and ACHR) and/or approaches of the regional human rights courts (ECtHR and IACtHR). This is because, on account of its global scope and widespread ratification, the ICCPR is the primary source of human rights obligations of the Ad Hoc Tribunals and the ICC, whilst the ECHR and the ACHR, as human rights instruments of regional reach, do not have binding authority vis-à-vis these institutions as such.[1109]

In more specific terms, the following norms fall into these categories. First, as concerns the essence of the right to appeal: (i) recourse to an appellate court at second instance must be available; (ii) appellate review contingent upon the exercise of discretionary powers by judicial officers or based on newly-discovered evidence constitute inadequate substitutes for appellate review; (iii) additional appellate review is not required in respect of a confirmed conviction accompanied by an aggravated sentence; and (iv) the right to appeal does not extend beyond appellate review at second instance, but, in case of a multi-tiered appellate edifice, effective access to each level of appeal must be granted. Second, the right to appeal has been exclusively granted to convicted persons, but, at the same time, such persons may relinquish this right. Third, regarding the regulation of the appellate process: (i) such regulation is permissible, provided that it is sufficiently precise/foreseeable and accessible; and (ii) appellate review by a "higher" court entails that the court carrying out appellate review must ensure review of a sufficient scope. Fourth, appellate proceedings must be conducted in accordance with the following requirements: (i) appellate review must be accessible, which entails, more specifically, a reasoned opinion provided by a court of first instance and correct and effective information as to applicable time-limits; (ii) oral hearings are required in respect of appellate hearings dealing with matters of fact and law and determining guilt or innocence; (iii) appellate judges must, in general, be impartial and, in specific, may not partake in pre-appeal and appeal proceedings in the same case or in interrelated appellate proceedings involving the same persons where their participation is such to allow them to form an opinion as to the charges; (iv) the accused has a right to be present at appellate hearings dealing with matters of fact and law and determining guilt or innocence; (v) the accused must be informed of the appellate modification of the basis of first instance

[1109] Introduction, Chapter 2.1.2.

proceedings; (vi) the accused is entitled to counsel and must be informed of such a right; (vii) indigent accused must be afforded counsel without remuneration; (viii) counsel appointed under a legal aid scheme must provide adequate legal assistance; (ix) the accused must be allowed to select privately retained counsel, although this right may be departed from with sufficient justification as to the necessity for the restriction or the impossibility of appointing legal aid counsel; (x) the right to a pro se defence persists on appeal, but may be curtailed in the interests of justice; (xi) the scope of appellate review must encompass both conviction and sentence (although such review may be confined to sentencing in particular circumstances) and questions of law; and (xii) appellate judgments need not necessarily be pronounced publicly, provided that alternative means of publication are available.

6.2. Dissimilar Norms or Approaches

International human rights instruments and/or their monitoring bodies and courts are at variance in respect of: (i) the possibility of the highest court sitting in first instance; (ii) the obligation to provide further appellate review regarding a final appellate conviction imposed in favour of an acquittal; (iii) the scope of appellate review; and (iv) the right to a reasoned opinion on appeal. Accordingly, whereas the norms and/or approaches to appellate fairness falling in the preceding category enjoy a sufficient foundation in international human rights law to bind the Ad Hoc Tribunals and the ICC in respect of their appellate proceedings, these norms and/or approaches lack, in principle, such a basis. It must accordingly be determined which norm or approach should guide the appellate proceedings of the Ad Hoc Tribunals and the ICC in respect of these matters. Scholarship and international appellate practice have not provided a well-defined solution in this regard. For instance, even though the jurisprudence of the Ad Hoc Tribunals has, in the final analysis, eschewed the human rights dimension of the question whether an appellate conviction replacing a first instance acquittal engenders a further right to appellate review, commentators and individual judges have endorsed either the approach by the HRC to Article 14(5) ICCPR (as supported by Article 8(2)(h) ACHR) or the norm contained in Article 2(2) Protocol 7 ECHR.[1110] Stated more generally, a choice for a particular norm or approach to appellate fairness has been suggested thus far.

However, this study will pursue a different method. It will assess whether aspects of the general right to a fair trial supplement the application of the various rights to appeal in

[1110] Part III, Chapter 10.1.4.

international human rights law and whether a common core of protection is inherent in the different legal bases. Accordingly, it integrates conflicting norms and/or approaches concerning appellate fairness in international human rights law in order to define applicable touchstones for the appellate proceedings of the Ad Hoc Tribunals and ICC. This method is better attuned to appellate proceedings in the context of international criminal law than a selective endorsement of a particular construct of appellate fairness.

First, this method garners broader support in international human rights law for appellate proceedings conducted by the Ad Hoc Tribunals and the ICC. This comports better with the nature of the human rights obligations of the Ad Hoc Tribunals and the ICC in relation to their appellate proceedings. In this regard, the U.N. Secretary-General expressed an intention to integrate the various conceptions of the right to appeal in the design of an appellate procedure for the Ad Hoc Tribunals. It has been indicated that the right to appeal "is a fundamental element of civil and political rights and has, inter alia, been incorporated in the" ICCPR.[1111] The use of "inter alia" signals that the appellate phase of the proceedings before the Ad Hoc Tribunals was not modelled exclusively after the ICCPR. This intention has been confirmed by the ICTY Appeals Chamber, which has found that the appellate provision of the ICTY Statute "reflects the position in *the general corpus of international human rights law*", namely "Article 14(5) [ICCPR], […] Article 2 [Protocol 7 ECHR], and […] Article 8(2)(h) [ACHR]". [1112] Furthermore, the rationale of "internationally recognized human rights" contained in Article 21(3) ICC Statute entails a similar need to ground the appellate proceedings of the ICC in the various sources of international human rights law. In this regard, it has been suggested that, with regard to treaty norms, "[t]he number and geographical distribution of States having ratified the respective treaty will have to be taken into consideration"[1113] as well as "the relevant reservations"[1114] to determine whether a particular norm is "internationally recognized". It follows that regional human rights instruments must, in addition, be assessed to determine whether particular aspects pertaining to appellate fairness enjoy a sufficient degree of international recognition, in view of the aforementioned divergences relating to this subject matter. Thus, the proposed method

[1111] U.N. Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, at 116 (emphasis in original).
[1112] Tadić Sentencing Appeal, at 29 (emphasis supplied). Similar: Aleksovski, at 104 (footnote 247).
[1113] G. Hafner and C. Binder, 'The Interpretation of Article 21 (3) ICC Statute. Opinion Reviewed', 9 *Austrian Review of International and European Law* 163 (2004), at 187.
[1114] Ibid., at 189.

guarantees an inclusive assessment of the various conceptions of the right to appeal in international human rights law, which ensures that a particular norm or approach to appellate fairness reflects "the general corpus of international human rights law" regarding the Ad Hoc Tribunals' appellate proceedings and surpasses the threshold of "internationally recognized" for the purposes of the ICC's appellate process.

Second, this method fully embraces the applicability of other fair trial guarantees to appellate proceedings. The Ad Hoc Tribunals (and arguably the ICC) have largely ignored fair trial guarantees other than the right to appeal in relation to their appellate proceedings.[1115] However, this study builds on the evolving indications in international human rights law as to the complementary regulatory effect inherent in other fair trial guarantees vis-à-vis appellate proceedings. In this manner, it concretises the interrelationship between these legal bases with regard to the appellate processes of the Ad Hoc Tribunals and the ICC.

Nevertheless, if it would prove impossible to define a common core of protection in different legal bases relating to appellate proceedings, it must be determined which norm or approach concerning appellate fairness in international human rights law carries more weight in legal terms. This will be assessed on the basis of the degree to which a particular norm and/or approach to appellate fairness has been accepted by States and/or the extent to which international human rights law digresses in relation to such a norm and/or approach.

6.2.1. First Instance Trial by Highest Court

The human rights instruments and their monitoring bodies and courts explicitly diverge on the question of trial in first instance by the highest courts in a judicial system. Whereas the HRC and IACtHR have found that such trials do not detract from the right to appeal and require an opportunity to have recourse to a higher instance,[1116] Protocol 7 ECHR provides an explicit exception in this regard.[1117] The ECtHR has not mitigated this exception on the basis of other fair trial guarantees contained in the ECHR, but has, on the contrary, found that no right of appeal may be deduced from Article 6 ECHR in these circumstances.[1118]

[1115] E.g., A. Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks', in M. Bergsmo (ed.), *Human Rights for the Downtrodden. Essays in Honour of Asbjørn Eide* 19 (Leiden: Brill Academic Publishers, 2003), at 47.
[1116] Part II, Chapter 2.3.5; Part II, Chapter 4.3.5.
[1117] Part II, Chapter 3.3.4.
[1118] Ibid.

Accordingly, international human rights law lacks a sufficient basis to demarcate a common core of protection in relation to this matter and it must, therefore, be determined which of the existing approaches carries superior legal weight. In this regard, it is recalled that several States have made reservations to Article 14(5) ICCPR to permit their highest courts to sit in first instance in particular circumstances and that, in such situations, the HRC has condoned such appellate constructions.[1119] In addition, as mentioned, an explicit exception has been enshrined in a legally binding manner in Protocol 7 ECHR. The approaches of the HRC and IACtHR to Articles 14(5) ICCPR and 8(2)(h) ACHR in relation to first instance trials before the highest courts, thus, enjoy insufficient support in international human rights law to bind the Ad Hoc Tribunals and the ICC. It follows that the Appeals Chambers of the Ad Hoc Tribunals and the ICC are, in principle, not prevented from sitting as courts of first instance.

6.2.2. Appellate Conviction Revoking Acquittal

Although the ICCPR and the ACHR require additional appellate review if an acquitted person is irrevocably convicted on appeal, Protocol 7 ECHR carves out an explicit exception to the right to appeal in such circumstances. This dichotomy, nevertheless, comprises a commonly applicable core, which is based on two foundations.

First, there is insufficient support for the interpretation provided to Article 14(5) ICCPR and Article 8(2)(h) ACHR in international human rights law. Several States have made reservations to this aspect of Article 14(5) ICCPR.[1120] Moreover, the relevant understanding of Article 14(5) ICCPR has not been laid down in the ICCPR, but emanates from a non-binding view of the HRC, whereas the exception foreseen in Article 2(2) Protocol 7 ECHR has been set forth in a legally binding instrument of a regional nature.[1121]

Second, the output of the human rights monitoring bodies and courts yields, in the aggregate, two commonly shared safeguards in respect of such convictions.

[1119] Part II, Chapter 2.3.5.
[1120] Part II, Chapter 2.3.4.
[1121] Similar: D. Sheppard, 'The International Criminal Court and 'Internationally Recognized Human Rights': Understanding Article 21(3) of the Rome Statute', 10(1) *International Criminal Law Review* 43 (2010), at 70.

The first safeguard demands a sufficient degree of appellate scrutiny in respect of the basis underlying the reversal of an acquittal into a non-reviewable conviction on appeal. Commencing with the ECtHR, it has required, as mentioned, oral hearings on appeal.[1122] This safeguard has been particularly emphasised in respect of appellate convictions in favour of acquittals by lower instances.[1123] Commentators have critically noted that the ECtHR "confuses the right to a public hearing […] with the right to be heard in person" as the crucial question in such cases does "not concern the publicity requirement but […] whether the court of appeal […] [can] properly […] [decide] to examine the case without the applicants having to present their arguments at a hearing".[1124] This critique overlooks the fact that a reorientation in Strasbourg jurisprudence provides a more appropriate basis. In this regard, the ECtHR has advanced that the denial of an opportunity to contest appellate conclusions by means of adversarial examination (also referred to as the right to a defence in the context of adversarial debate) infringes this right.[1125] It, thus, specified that a public hearing is a vehicle to ensure that contentious matters of fact have been sufficiently litigated on appeal. Be that as it may, the ECtHR has not only required intensified appellate scrutiny on the basis of oral hearings, but also pursuant to the right to examine, or have examined, witnesses on appeal.[1126] The possibility of examining witnesses on appeal necessarily requires a broadened assessment of the underlying aspects of a first instance acquittal. As to the HRC, it has similarly invoked the requirement of appellate hearings. Although it initially found that Article 14(5) ICCPR does not necessitate an appellate hearing,[1127] it subsequently held that such hearings are required on the basis of Article 14(1) ICCPR when first instance acquittals are revoked in favour of final convictions,[1128] pursuant to, *inter alia,* the jurisprudence of the ECtHR.[1129] Despite these diverging legal bases, both institutions have unequivocally stressed the need to ensure enhanced evidentiary evaluation in such circumstances. Thus, the ECtHR has held that, despite the submission of written arguments,[1130] appellate hearings require the

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[1122] Part II, Chapter 3.1.2.
[1123] Ibid.
[1124] P. van Dijk, F. van Hoof, A. van Rijn, and L. Zwaak, (eds.), *Theory and Practice of the European Convention of Human Rights* (Antwerpen: Intersentia, 2006), at 599 (emphasis in original). Similar: S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 131.
[1125] Part II, Chapter 3.1.2.
[1126] Part II, Chapter 3.2.4.
[1127] Part II, Chapter 2.1.2.
[1128] Ibid.
[1129] Ibid.
[1130] Judgment, *Constantinescu v. Romania*, Application No. 28871/95, ECtHR, 27 June 2000, at 18, 58-59; Judgment, *Ekbatani v. Sweden*, Application No. 10563/83, ECtHR, 26 May 1988, at 15; Judgment, *Lacadena Calero v. Spain*, Application No. 23002/07, ECtHR, 22 November 2011, at 40.

production of evidence[1131] or the direct appreciation of witness testimony.[1132] The latter aspect is, of course, also a direct result of the right to "examine or have examined witnesses" on appeal.[1133] Highlighting that an appellate court had reviewed the trial record without "hearing the testimony of any witnesses",[1134] the HRC similarly operated under the understanding that appellate hearings must, at least, facilitate witness examination.[1135]

The second safeguard rules out irrevocable appellate reversals of acquittals based on a requalification of the original judgment that either: (i) provides insufficient notice to the person concerned; or (ii) results from legal or factual elements extrinsic to the original charges. The HRC and ECtHR have resorted to disparate legal bases in this regard as well, namely Article 14(5) ICCPR and a combined application of Article 6(3)(a)-(b) ECHR, but they have both concluded that a violation of these provisions may originate in an act of appellate requalification.[1136] Therefore, these provisions are capable of addressing a highly similar challenge to appellate fairness — a requalification of an inferior decision by an appellate court may deny the person concerned a further opportunity to appeal a conviction imposed for the first time on appeal and, at the same time, it may entail rejection of a sufficiently detailed notification of the accusation and adequate time and facilities for the preparation of a defence. However, whilst the ECtHR has clarified that Article 6(3)(a)-(b) ECHR is only violated in relation to appellate re-qualifications of which insufficient notice is provided[1137] or that are extrinsic to the original accusation,[1138] the HRC has not

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[1131] Judgment, *Popovici v. Moldova*, Applications Nos. 289/04 & 41194/04, ECtHR, 27 November 2007, at 70-72.
[1132] Judgment, *Lacadena Calero v. Spain*, Application No. 23002/07, ECtHR, 22 November 2011, at 40; Judgment, *Vilanova Goterris & Llop Garcia v. Spain*, Applications Nos. 5606/09 & 17516/09, ECtHR, 27 November 2012, at 35.
[1133] E.g., Judgment, *Destrehem v. France*, Application No. 56651/00, ECtHR, 18 May 2004, at 46-47; Judgment, *Dănilă v. Romania*, Application No. 53897/00, ECtHR, 8 March 2007, at 60-63.
[1134] Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 2.10.
[1135] As discussed, the HRC has also referred to the right "[t]o examine, or have examined, the witnesses against him", but its views in relation to the application of this right to the appellate phase of a criminal case are not sufficiently clear. See: Part II, Chapter 2.2.4.
[1136] Views, *Conde Conde v. Spain*, Communication No. 1325/2004, HRC, 31 October 2006, at 2.3, 2.5, 7.2 (an offence was characterised as continuing as opposed to time-barred); Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999, at 58-63 (the mode of liability was requalified from perpetration to aiding and abetting). Some further support has been provided by an identical application by the IACtHR of the corresponding protection contained in Article 8(2)(b) ACHR. See: Part II, Chapter 4.2.1.
[1137] The sufficiency of the notification hinges on the specific circumstances. It can even be provided on appeal. E.g., Judgment, *Bäckström & Andersson v. Sweden*, Application No. 67930/01, ECtHR, 5 September 2006, at 8-10.
[1138] In general, the ECtHR considers whether the requalification is based on legal or factual elements additional to the original charge(s). See: e.g., Judgment, *Pélissier & Sassi v. France*, Application No. 25444/94, ECtHR, 25 March 1999, at 58; Judgment, *Salvador Torres v. Spain*, Application No. 21525/93, ECtHR, 24 October 1996, 30-33; Judgment, *Juha Nuutinen v. Finland*, Application No. 45830/99, ECtHR, 24 April 2007, at 32-33.

established any such limitations.[1139] Even so, if a substitution of an acquittal for a conviction inevitably prompts the protection of Article 14(5) ICCPR, this provision must apply *a fortiori* regarding re-qualifications suffering from the aforementioned defects. What is more, the HRC and ECtHR have demanded nearly identical fair trial protection in such circumstances. In this regard, it has been determined that Article 6(3)(a)-(b) ECHR explicitly absorbs, in part, the fundamental protection provided by Article 14(5) ICCPR. That is, the ECtHR has considered whether further appellate recourse is available to the person concerned following an act of appellate re-qualification.[1140] Needless to say, the availability of appellate remedies lies at the very heart of the application of Article 14(5) ICCPR.[1141] It may be held, in contrast, that the appellate recourse required in respect of Article 6(3)(a)-(b) ECHR is merely of a remedial character, whereas it is the quintessential purpose of Article 14(5) ICCPR. However, this distinction is offset by the fact that both legal bases require appellate review of sufficient scope. As discussed, according to the HRC, Article 14(5) ICCPR imposes "a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case".[1142] Similarly, under Article 6(3)(a)-(b) ECHR, the ECtHR requires that "all relevant legal and factual aspects of the conviction [be contested] before the appeal court".[1143] The latter approach is especially relevant when considering that it requires a heightened threshold in comparison with Protocol 7 ECtHR, which confines appellate review to legal matters.[1144]

In summary, in the current state of international human rights law, the better approach is to proceed on a shared basis between, on the one hand, Article 14(5) ICCPR, as endorsed by Article 8(2)(h) ACHR, and, on the other hand, Article 6 ECHR and Article 2 Protocol 7 ECHR. This construction recognises that final appellate convictions as a replacement of first instance acquittals are, as such, permissible, but carves out two commonly shared safeguards to allay a potential fairness deficit, i.e. the provision of a sufficient degree of appellate

[1139] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 47.
[1140] Judgment, *Juha Nuutinen v. Finland*, Application No. 45830/99, ECtHR, 24 April 2007, at 8-14, 32; Judgment, *Dallos v. Hungary*, Application No. 29082/95, ECtHR, 1 March 2001, at 48-53; Judgment, *Sipavičius v. Lithuania*, Application No. 49093/99, ECtHR, 21 February 2002, at 29-34.
[1141] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 47.
[1142] Part II, Chapter 2.3.6.
[1143] Judgment, *Juha Nuutinen v. Finland*, Application No. 45830/99, ECtHR, 24 April 2007, at 33.
[1144] Part II, Chapter 3.3.3.2.

scrutiny and the exclusion of appellate convictions without sufficient notice to the convicted person or grounded in legal or factual elements extrinsic to the original charges.

6.2.3. Scope of Appellate Review

In relation to the scope of appellate review, the same division persists, seeing that, on the one hand, the HRC and IACtHR demand appellate review of both questions of law and fact and, on the other hand, Protocol 7 ECHR is limited to appellate review extending to questions of law. However, a commonly applicable core exists in respect of this matter as well.

In the literature, the reach of appellate review under, especially, Article 14(5) ICCPR has been overstated. It has been indicated, for instance, that this provision imposes a need to conduct "an evaluation of *the evidence* presented at the trial"[1145] or "a *complete* review".[1146] On the basis of the views of the HRC, the better view is that it requires appellate courts only to deal with those issues of fact that are most pertinent to the adjudication of the matter at hand. It is indicative, in this regard, that the HRC's descriptions of the required scope of appellate review denote a narrowing trend. Whereas early descriptions demanded "full review",[1147] "a duty to review substantively […], such that the procedure allows for *due consideration of the nature of the case*" applies currently.[1148] Similarly, whereas "the evidence"[1149] used to constitute the object of appellate review, the current standard only stipulates that "the *sufficiency* of evidence" must be reviewed.[1150] This tendency has clearly left its traces in the views of the HRC. The need to conduct a full retrial or a rehearing on appeal has been explicitly rejected.[1151] In addition, the application of this benchmark does not disclose a need to review all factual aspects of a case on appeal either. In departing from a previous line of

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[1145] S. Shah, 'The Administration of Justice', in D. Moeckli, S. Shah, and S. Sivakumaran (eds.), *International Human Rights Law* 304 (Oxford: Oxford University Press, 2010), at 327 (emphasis supplied). Similar: A. Conte and R. Burchill, *Defining Civil and Political Rights, the Jurisprudence of the United Nations Human Rights Committee* (Farnham: Ashgate, 2009), at 194.
[1146] L. Burgorgue-Larsen and M. Úbeda de Torres, *The Inter-American Court of Human Rights - Case Law and Commentary* (Oxford: Oxford University Press, 2011), at 661 (emphasis supplied).
[1147] Views, *Domukovsky et al. v. Georgia*, Communications Nos. 623/1995, 624/1995, 626/1995 & 627/1995, HRC, 6 April 1998, at 18.11.
[1148] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 48 (emphasis supplied).
[1149] Views, *Lumley v. Jamaica*, Communication No. 662/1995, HRC, 31 March 1999, at 7.3. Similar: Views, *Rogerson v. Australia*, Communication No. 802/1998, HRC, 3 April 2002, at 7.5; Views, *Romanov v. Ukraine*, Communication No. 842/1998, HRC, 30 October 2003, at 6.5.
[1150] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 48 (emphasis supplied).
[1151] Views, *Perera v. Australia*, Communication No. 536/1993, HRC, 28 March 1995, at 5.5, 6.4; Views, *Juma v. Australia*, Communication No. 984/2001, HRC, 28 July 2003, at 7.5; Views, *Gbondo Sama v. Germany*, Communication No. 1771/2008, HRC, 28 July 2009, at 6.8.

views concerning the scope of appellate review in the Spanish legal system, the HRC has held that two appellate instances had "thoroughly addressed the author's allegation that circumstantial evidence was *insufficient* to convict him, and disagreed with his account, developing extensive arguments to conclude that the evidence, though circumstantial, was *sufficient* to warrant the author's conviction".[1152] Subsequent views have largely proceeded along these lines, probing whether the inferior conviction is sufficiently based in fact as opposed to a review of all factual elements.[1153] Article 8(2)(h) ACHR has been applied in a similar manner in practice. Despite indications of a scope of appellate review exceeding Article 14(5) ICCPR, such as the need for "a thorough analysis or examination of *all the issues* debated and analyzed in the lower court",[1154] the IACtHR has clarified that an appellate remedy requires an analysis of "questions of fact, evidence, and law upon which the contested judgment is based", but that a new trial is not necessarily required.[1155]

At the same time, despite the limitation reflected in Protocol 7 ECHR, the view has been put forward that the application of Article 6 ECHR to appellate proceedings curtails States' margin of appreciation in respect of, *inter alia*, the scope of review on appeal.[1156] While this line of thought has not been specified in full, the jurisprudence of the ECtHR indeed reveals such indications. According to the ECtHR, the right to a public hearing under Article 6(1) ECHR,[1157] which remains unaffected by the more limited scope of Article 2 Protocol 7 ECHR, operates to ensure a sufficiently wide scope of review in situations in which appellate courts have been mandated to revisit factual issues and conclusively determine guilt or innocence.[1158] As noted, the ECtHR has extrapolated the applicant's right to be heard in

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[1152] Views, *Parra Corral v. Spain*, Communication No. 1356/2005, HRC, 29 March 2005, at 4.3 (emphasis supplied).
[1153] Part II, Chapter 2.3.6.
[1154] Judgment, *Herrera-Ulloa v. Costa Rica*, Series C. No. 107, IACtHR, 2 July 2004, at 150, 152, 165, 167 (emphasis supplied).
[1155] Judgment, *Mohamed v. Argentina*, Series C. No. 255, IACtHR, 23 November 2012, at 101-102.
[1156] S. Trechsel, 'Das Verflixte Siebente? Bemerkungen zum 7. Zusatzprotokoll zur EMRK', in M. Nowak, D. Steuer, and H. Tretter (eds.), *Fortschritt im Bewußtsein der Grund- und Menschenrechte, Festschrift für Felix Ermacora* 195 (Kehl: N.P. Engel Verlag, 1988), at 203.
[1157] As noted, the ECtHR has also indicated that the right to examine, or have examined, witnesses may require the rehearing of witnesses on appeal, which could further increase the scope of appellate review. However, as noted, this provision has, in practice, mainly been applied to situations in which a conviction has been imposed on appeal following an appeal from an acquittal. See: Part II, Chapter 3.2.4; Part II, Chapter 6.2.2.
[1158] Besides the fact that the division between matters of fact and matters of law is not easily discerned (e.g., Judgment, *Hermi v. Italy*, Application No. 18114/02, ECtHR, 18 October 2006, at 95, Dissenting Opinion of Judge Zupančič), it must be noted that this determination is autonomous in character. The Strasbourg organs have, thus, established this matter independently from the label assigned to the appellate procedure under domestic law. Indeed, rulings in which appellate issues have been deemed factual, in contradiction to their characterisation as legal under domestic law, have been provided on several occasions. E.g., Judgment, *Botten v.*

person from this right.[1159] In the context of appellate proceedings, this right primarily concerns, as mentioned, the right to adduce evidence, which widens the requisite scope to determinative questions of fact, without, however, requiring a trial *de novo*.[1160]

Accordingly, international human rights law as a whole demands that matters of fact are assessed by appellate courts that are mandated to examine such matters and decisively determine guilt or innocence. However, a trial *de novo* is not required, as this aspect of appellate fairness extends only to the consideration of determinative matters of fact.

6.2.4. Reasoned Opinion

Even though all three human rights courts and monitoring bodies require an appellate court to provide a reasoned opinion,[1161] the scope of the corresponding right varies. In this regard, the IACtHR appears to have imposed a higher threshold than the HRC and the ECtHR.[1162] In more specific terms, the former demands "clear, *complete* and logical grounds" by an appellate body[1163] and the latter have accepted appellate opinions confined to determinative issues[1164]. Even so, the ICCPR, including the views of the HRC, is, as discussed, leading in respect of the international human rights law obligations of the Ad Hoc Tribunals and the ICC.[1165] What is more, this interpretation is strengthened by a similar interpretation provided by the ECtHR to the right to a reasoned opinion in appellate proceedings. This joint interpretation entails that the right to a reasoned opinion does not extend to each and every issue raised on appeal, but that it requires sufficient or meaningful consideration of the core issues before an appellate body. The more narrow interpretation of the right to a reasoned opinion on appeal enjoys, therefore, a stronger basis in international human rights law.

Norway, Application No. 16206/90, ECtHR, 19 February 1996, at 49; Judgment, *Igual Coll v. Spain*, Application No. 37496/04, ECtHR, 10 March 2009, at 38-39; Judgment, *Marcos Barrios v. Spain*, Application No. 17122/07, ECtHR, 21 September 2010, at 40; Judgment, *Lacadena Calero v. Spain*, Application No. 23002/07, ECtHR, 22 November 2011, at 6-22, 48; Judgment, *Serrano Contreras v. Spain*, Application No. 49183/08, ECtHR, 20 March 2012, at 35-42; Judgment, *Vilanova Goterris & Llop Garcia v. Spain*, Applications Nos. 5606/09 & 17516/09, ECtHR, 27 November 2012, at 33-37.

[1159] Part II, Chapter 3.1.2.

[1160] Ibid.

[1161] Part II, Chapter 5.1.4.8.

[1162] Ibid.

[1163] Judgment, *Catrimán et al. v. Chile*, Series C. No. 279, IACtHR, 29 May 2014, at 288. Also: Part II, Chapter 4.3.3.

[1164] Part II, Chapter 2.3.9; Part II, Chapter 3.1.1.

[1165] Introduction, Chapter 2.1.2; Part II, Chapter 6.1.

PART THREE

Part three will, in chapter one, describe the general inception of the right to appeal in the context of the establishment of the Ad Hoc Tribunals and the ICC and the manner in which the Appeals Chambers have explained the rationale of this right. Thereafter, part three will expound on the specific configurations of the appellate systems of the Ad Hoc Tribunals and the ICC and contrast the disparate elements against the yardsticks developed in part two. Proceeding in a rough chronological order of the appellate process, chapters two through eleven will address and assess the essence of appellate review, the manner in which the appellate process has been regulated, the bearers of the right to appeal, legal representation of the accused on appeal, the composition of the Appeals Chambers, access to the Appeals Chambers, the oral and written nature of the appellate proceedings, the scope of appellate review, the powers of the Appeals Chambers, and the pronouncement of an appellate judgment. Finally, in the conclusion, an explanation concerning the compatibility (or lack thereof) of the specific components of the appellate processes of the Ad Hoc Tribunals and the ICC with the relevant norms of international human rights law will be provided.

1. Inception of the Right to Appeal

1.1. Ad Hoc Tribunals

The negotiation process preceding the establishment of the ICTY was marked by a lack of enthusiasm in relation to appellate proceedings. Canada, for example, noted that "[p]rocedures for appeal […] must be established […] despite any practical difficulties that these proceedings may present".[1166] Similarly, France put forward that "the practical difficulty of establishing appeals proceedings [dedicated to questions of fact] indicates that it is in fact not desirable that such proceedings be instituted" and that appeals on question of law require an "extremely cumbersome judicial machinery".[1167] Even so, it was generally agreed that appellate proceedings should be conducted in one manner or another.[1168]

[1166] U.N. Security Council, Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General, S/25594, 14 April 1993, Annex, at 16.
[1167] U.N. Security Council, Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, S/25266, 10 February 1993, at 140, 145.
[1168] Ibid., at 144-153; U.N. Security Council, Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, S/25537, 6 April 1993, Annex I, Art. 22; U.N. Security Council, Note Verbale Dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations Addressed to the Secretary-General, S/25716, 4 May 1993, Annex, at 7; U.N. Security Council, Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, S/25575, 12 April 1993, Annex II, Art. 24; U.N.

However, two matters surfaced prominently. First, the majority of the contributing States preferred an appellate system limited to questions of law,[1169] whereas some explicitly foresaw a factual component in addition to appellate review of questions of law[1170] or remained neutral in this regard.[1171] France, for instance, explained its position in some detail. It referred to the lack of appellate review of questions of fact demanded by Article 14(5) ICCPR and the compensatory safeguards of the "great formality of the trial", "the publicity attracted by it", and "the existence of revision proceedings […] review proceedings and the possibility of a pardon".[1172] Second, prosecutorial rights of appeal proved divisive. The U.S., for example, exclusively reserved the right to appeal to the defence,[1173] but the majority explicitly favoured an extension of the right to appeal to the prosecutor.[1174] The Netherlands, for instance, referred to the principle of the "equality of arms" as a justification for such a right.[1175]

Security Council, Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General, S/25300, 17 February 1993, Annex II, Art. 12; U.N. Security Council, Letter Dated 31 March 1993 from the Representative of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General, S/25512, 5 April 1993, Annex, at 7.

[1169] U.N. Security Council, Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, S/25537, 6 April 1993, Annex I, Art. 22; U.N. Security Council, Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, S/25266, 10 February 1993, at 152; U.N. Security Council, Note Verbale Dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations Addressed to the Secretary-General, S/25716, 4 May 1993, Annex, at 7.

[1170] U.N. Security Council, Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, S/25575, 12 April 1993, Annex II, Art. 24; U.N. Security Council, Letter Dated 31 March 1993 from the Representative of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General, S/25512, 5 April 1993, Annex, at 7.

[1171] U.N. Security Council, Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General, S/25594, 14 April 1993, Annex, at 16; U.N. Security Council, Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General, S/25300, 17 February 1993, Annex II, Art. 12.

[1172] U.N. Security Council, Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, S/25266, 10 February 1993, at 139-140.

[1173] U.N. Security Council, Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, S/25575, 12 April 1993, Annex II, Arts. 20(i), 24(a).

[1174] U.N. Security Council, Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, S/25537, 6 April 1993, Annex I, Art. 22; U.N. Security Council, Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, S/25266, 10 February 1993, at 151; U.N. Security Council, Note Verbale Dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations Addressed to the Secretary-General, S/25716, 4 May 1993, Annex, at 7; U.N. Security Council, Letter Dated 31 March 1993 from the Representative of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General, S/25512, 5 April 1993, Annex, at 7; U.N. Security Council, Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General, S/25300, 17 February 1993, Art. 12.

[1175] U.N. Security Council, Note Verbale Dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations Addressed to the Secretary-General, S/25716, 4 May 1993, Annex, at 7.

The negotiation process led to the adoption of the Secretary-General Report on the establishment of the ICTY. This document did not treat the matter extensively, in view of the fact that the description of the principles underlying the establishment of an Appeals Chamber was limited to three paragraphs. It noted that, since the right to appeal "is a fundamental element of civil and political rights and has, inter alia, been incorporated in the […] [ICCPR], […] there should be an Appeals Chamber".[1176] The right to appeal, which extends to the prosecutor as well, "should be exercisable on two grounds: an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice".[1177] Finally, it was considered that "[t]he judgement of the Appeals Chamber affirming, reversing or revising the judgement of the Trial Chamber would be final".[1178]

As a result of this negotiation process, the role of the Ad Hoc Tribunals' Appeals Chambers has been described as unique. A former judge of the ICTY has noted that the characterisation of the role of the Appeals Chambers is not uncomplicated, since, structurally, they must play the role of a Supreme Court, but must treat a large variety of other appeals too.[1179] Indeed, the Ad Hoc Appeals Chambers have revealed their distinct roles in their pronouncements. First, the Ad Hoc Appeals Chambers have assumed a "developmental" role. In this regard, they have considered, for instance, that they may "raise questions *proprio motu* or agree to examine alleged errors which […] raise an issue of general importance for the case-law or functioning of the Tribunal[s] […] to ensure the development of the […] case-law and the standardisation of the applicable law"[1180] and that, "in the interests of certainty and predictability", the Ad Hoc Appeals and Trial Chambers should follow previous decisions of the Ad Hoc Appeals Chambers, although the latter may depart from previous decisions "for cogent reasons in the interests of justice".[1181] Second, the Ad Hoc Appeals Chambers give effect to the "individualised" effects of appellate review. For instance, the ICTY Appeals Chamber has noted that "[a]n individual's right to appeal a judgement of a Trial Chamber

[1176] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, at 116 (emphasis in original).
[1177] Ibid., at 117.
[1178] Ibid., at 118.
[1179] C. Jorda and M. Saracco, 'Le Rôle de la Chambre d'Appel du Tribunal Pénal International pour l'Ex-Yougoslavie et pour le Rwanda', in J.-P. Marguénaud, M. Massé, and N. Poulet-Gibot Leclerc (eds.), *Apprendre à Douter: Questions de Droit, Questions sur le Droit, Études Offertes à Claude Lombois* 583 (Limoges: Presses Universitaires de Limoges, 2004), at 587.
[1180] Krnojelac, at 7. Also: Akayesu, at 21-22. Also: Part III, Chapter 9.1.1.2.
[1181] Aleksovski, at 107, 113. Also: Decision, *Semanza v. Prosecutor*, Case No. ICTR-97-23-A, ICTR, Appeals Chamber, 1 June 2000, at 92.

resulting in conviction is established under Article 25 of the Statute".[1182] It has further considered that "[t]he right to a fair trial requires and ensures the correction of errors made at trial" and "the principle of fairness is the ultimate corrective of errors of law and fact".[1183] Appellate review has also been described as a mechanism for "[t]he prevention of injustice arising from error"[1184] and a "safeguard" concerning erroneous sentencing decisions.[1185]

1.2. ICC

Even though the number of provisions dedicated to the appellate process in the ICC Statute is limited vis-à-vis the pre-trial and trial stage, the negotiation process "proved difficult and time-consuming", because of "the need to achieve a blending of the approaches taken in the major legal" systems of the world".[1186] This difficulty mainly manifested itself in relation "to the question whether the prosecutor should be able to appeal against the decision of a Trial Chamber to acquit an accused person".[1187] However, at the diplomatic conference at which the ICC Statute was adopted, delegations "were cognizant that Article 81 [ICC Statute] reflected a compromise between civil and common law jurisdictions" and the debate, thus, concentrated on the details of this Article, namely "the grounds upon which the Prosecutor and the convicted person may base an appeal" and "the grounds upon which a sentence may be appealed".[1188] Two main issues were raised in respect of Article 83 ICC Statute, which regulates the proceedings on appeal. First, a previous draft "to the effect that the accused would only be able to raise defences at the appeal stage which had already been raised in the Trial Chamber" was rejected, as "[m]any delegations argued such a provision would preclude fresh evidence which arises after the trial, and would penalize an accused whose defense counsel had not raised certain defenses and/or evidence at trial".[1189] Second, "[m]any delegations wanted *all* of the judges in the Appeals Chamber to agree upon the final decision", while "other delegations […] thought majority decisions should be allowed".[1190] Eventually, an agreement was reached "that the Appeals Chamber shall deliver one judgement which shall

[1182] Tadić Sentencing Appeal, at 29.
[1183] Aleksovski, at 106.
[1184] Mučić et al. Sentencing Appeal, at 50.
[1185] Kunarac et al., at 374.
[1186] H. Brady and M. Jennings, 'Appeal and Revision', in R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* 294 (The Hague: Kluwer Law International, 1999), at 294.
[1187] Ibid., at 297.
[1188] Ibid., at 299.
[1189] Ibid., at 301.
[1190] Ibid. (emphasis in original).

contain the views of the majority and minority, but a judge may deliver a separate or dissenting opinion on a question of law".[1191]

The role of the ICC Appeals Chamber may be characterised in a manner similar to the role of the Appeals Chambers of the Ad Hoc Tribunals, even though the ICC Appeals Chamber has not explicitly defined this matter. It is, however, uncontroversial that, analogous to the Ad Hoc Tribunals, the ICC Appeals Chamber has, in principle, a "developmental" role and brings the "individualised" effects of appellate review to fruition.[1192] The latter is mainly established by the explicit assignment of a right to appeal to a convicted person on several grounds.[1193] As to the former, it has been noted that "[t]he particular significance of the [ICC] Appeals Chamber […] is its ability to ensure coherence and consistency of the law",[1194] which is mainly reflected in its mandate to address errors of law.[1195] Nevertheless, the ICC Appeals Chamber appears to have adopted, on balance, a more guarded approach to this aspect of its role, especially when contrasted against the early practice of the Ad Hoc Appeals Chambers.[1196] For instance, it has noted that a particular "determination has not been challenged on appeal by any of the parties"[1197] and decided, "not to consider" this question.[1198] In this respect, a dissenting judge found, without further elaboration, that "it is necessary for the [ICC] Appeals Chamber to address this issue *proprio motu*".[1199] In a similar vein, it has considered it inappropriate "to give further guidance on the parameters of" a legal notion[1200] and that "it is not necessary […] to determine which of the possible approaches" to an issue of interpretation was correct.[1201] This may be due to the fact that "the density of legal regulation" is higher at the ICC than at the Ad Hoc Tribunals and that the ICC Appeals

[1191] Ibid.
[1192] Part I, Chapter 5.1.8.
[1193] Art. 81(1)(b) ICC Statute. Also: V. Nehrlich, 'The Role of the Appeals Chamber', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* 963 (Oxford: Oxford University Press, 2015), at 980.
[1194] V. Nehrlich, 'The Role of the Appeals Chamber', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* 963 (Oxford: Oxford University Press, 2015), at 980.
[1195] Art. 81(1)(a)(iii), 81(1)(b)(iii) ICC Statute.
[1196] V. Nehrlich, 'The Role of the Appeals Chamber', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* 963 (Oxford: Oxford University Press, 2015), at 978-979.
[1197] Lubanga, at 37.
[1198] Ibid., at 38.
[1199] Ibid., Partly Dissenting Opinion of Judge Sang-Hyun Song, at 1.
[1200] Lubanga, at 335.
[1201] Lubanga Sentencing Appeal, at 66.

Chamber "is not a higher court vis-à-vis the other [ICC Trial] Chambers",[1202] since the ICC Statute does not recognise binding precedent.[1203]

2. Essence of Appellate Review

2.1. Ad Hoc Tribunals and ICC

2.1.1. Availability of Appellate Recourse

The Ad Hoc Tribunals' legal system comprises "three Trial Chambers and an Appeals Chamber".[1204] According to the Report of the U.N. Secretary-General, the inclusion of an Appeals Chamber into the institutional structures of the Ad Hoc Tribunals was motivated by the right to appeal as a norm of international human rights law. As mentioned, it indicates that the right to appeal "is a fundamental element of civil and political rights and has, inter alia, been incorporated in the […] [ICCPR] […], which is why "there should be an Appeals Chamber".[1205] Furthermore, the ICTY Appeals Chamber has invoked the various standards concerning the right to appeal in international human rights law. Specifically, it has considered that the appellate provision of the ICTY Statute "reflects the position in the general corpus of international human rights law", in respect of which it has invoked, "in particular, […] Article 14(5) [ICCPR], […] Article 2 [Protocol 7 ECHR], and […] Article 8(2)(h) [ACHR]".[1206] In addition, it has found that "[t]he right of appeal is a component of the fair trial requirement", which "is […] a requirement of customary international law".[1207] It has even stated, in the context of the right to appeal, that "Article 14 […] [ICCPR] reflects an imperative norm of international law to which the […] [ICTY] must adhere".[1208]

The judicial structure of the ICC consists of "[a]n Appeals Division, a Trial Division and a Pre-Trial Division".[1209] The rationale for the establishment of the ICC Appeals Chamber may

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[1202] V. Nehrlich, 'The Role of the Appeals Chamber', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* 963 (Oxford: Oxford University Press, 2015), at 979-980.
[1203] Art. 21(2) ICC Statute.
[1204] Art. 11(a) ICTY Statute; Art. 10(a) ICTR Statute.
[1205] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, at 116 (emphasis in original).
[1206] Tadić Sentencing Appeal, at 29.
[1207] Aleksovski, at 104. In addition to the ICCPR, ECHR Protocol 7, and ACHR, the Appeals Chamber also referred to Article 7 ACHPR. See: Aleksovski, at 104 (footnote 247).
[1208] Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, *Prosecutor v. Tadić*, Case No. IT-94-1-A-AR77, ICTY, Appeals Chamber, 27 February 2001, at p. 3.
[1209] Art. 34(b) ICC Statute.

primarily be traced back to the right to appeal as a human rights norm as well. This is illustrated by the fact that the ILC Draft Statute for the ICC referred to Article 14(5) ICCPR as a basis for the need to provide appellate review, in combination with Article 25 ICTY Statute.[1210] However, the ICC Appeals Chamber has not specifically referred to these standards in its early jurisprudence.

2.1.2. Remit of Appellate Recourse

In contradistinction to most national systems, which operate a three-tier legal process, the Ad Hoc Tribunals feature a two-stage procedure. The ICTY Appeals Chamber has specifically noted these limitations. It has held that, whereas Civil Law systems provide "a *de novo* rehearing, followed by two or more levels of appeal on matters of law, or on matters of both facts and law" and Common Law systems ensure "either one or two levels of appeal on matters of law, or on matters of mixed fact and law", the ICTY "has only one level of appeal".[1211] It has concluded, accordingly, that "[t]he prospect of an injustice resulting from a judgment of the [ICTY] Appeals Chamber is not met by any further levels of appeal".[1212]

Although the ICC operates a three-tier judicial structure, consisting of a pre-trial, trial, and appeal phase, it does not contemplate a two-staged appellate process either. Whereas the ICC Statute permits "the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber",[1213] it lacks a similar provision regarding the Appeals Division.

2.2. Evaluation

2.2.1. Availability of Appellate Recourse

The essential function of the right to appeal, i.e. the availability of appellate recourse, is firmly entrenched in international human rights law and binds, on this basis, the Ad Hoc Tribunals and the ICC.[1214] The inclusion of an appellate stage into the legal systems of the Ad Hoc Tribunals and the ICC ensures that this obligation has been complied with.

[1210] C. Staker and F. Eckelmans, 'Article 81', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1915 (München: Verlag C.H. Beck, 2016), at 1916-1917.
[1211] Mučić et al. Sentencing Appeal, at 50-51 (emphasis in original).
[1212] Ibid., at 51.
[1213] Art. 39(2)(c) ICC Statute.
[1214] Part II, Chapter 5.1.1.1; Part II, Chapter 6.1. The matter of alternative mechanisms employed instead of appellate review need not be assessed, considering that the Ad Hoc Tribunals and the ICC have not engaged in

It has, however, been maintained that "[t]he right of appeal guaranteed under international human rights provisions would not perforce have required the creation of an appeals section in the ad hoc Tribunals or in the ICC systems".[1215] This position suggests that "the exception of trials held before the highest available court, which is explicitly provided for by the rules of the […] [ECHR], but which may also be considered implicit in the other provisions, would naturally have covered international judicial organs".[1216] Thus, although no such exception has been provided for in the Statutes of the Ad Hoc Tribunals and the ICC, it would operate to remove the legal obligation for these institutions to provide appellate review altogether. Although this exception is not implicit in Article 14(5) ICCPR and Article 8(2)(h) ACHR, the state of international human rights law permits, in principle, trials in first instance by the Appeals Chambers of the Ad Hoc Tribunals and the ICC.[1217] Even so, over and above the fact that the legal texts of the Ad Hoc Tribunals and the ICC do not allow for such a possibility and that, in practice, such proceedings have not been conducted in relation to those charged with crimes falling within the primary jurisdictions of the Ad Hoc Tribunals and the ICC,[1218] this exception is not transposable to international criminal procedure.

The possibility of applying this exemption is premised on a false analogy between international and domestic jurisdictions. It has been noted that this exception "actually presupposes the continued existence of a judicial hierarchy made up of higher and lower

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such a course of action. Furthermore, except for the possibility of trial by the highest court sitting in first instance, the exceptions to the right to appeal encountered in international human rights law are reserved for the discussion on the powers of the Appeals Chambers of the Ad Hoc Tribunals and the ICC. See: Part III, Chapter 10.

[1215] S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), at 159.

[1216] Ibid., at 159. The author further indicated that "the decisions of international courts are generally not subject to appeal" and that "earlier international criminal tribunals (Nuremberg and Tokyo) did not provide for a right of appeal". These arguments are unconvincing. As to the former, it has been argued that this analogy is "inappropriate", since it "is tantamount to saying that no appeal lies as of right before international *criminal* courts and tribunals because that is the prevailing situation before other international jurisdictions *with no power to convict*", whereas "[u]nder human rights law, every individual is entitled to appeal against his or her conviction". See: L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms … or Tied Down?', 19(3) *Leiden Journal of International Law* 847 (2006), at 865 (emphasis in original). As to the latter, these precedents are largely irrelevant, considering that the right to appeal was first enshrined in the ICCPR in 1976, after the proceedings of the Military Tribunals sitting in Nuremberg and Tokyo had already been brought to an end in 1946 and 1948, respectively.

[1217] Part II, Chapter 6.2.1.

[1218] However, ruling in the first instance, the Appeals Chamber of the ICTY has convicted a person of contempt of court. Accordingly, the question arose whether this person was entitled to have his conviction reviewed. Referring to Article 14(5) ICCPR, the ICTY Appeals Chamber answered in the affirmative. See: Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, *Prosecutor v. Tadić*, Case No. IT-94-1-A-AR77, ICTY, Appeals Chamber, 27 February 2001, at p. 3.

courts" and, "[s]ince single-instance international jurisdictions are not by definition integrated into a judicial hierarchy, they are 'supreme' in a meaning that substantially differs from that of the exception".[1219] Indeed, the highest domestic courts are located in the upper echelons of a State's judicial system on account of, e.g., the qualifications of their judicial benches and their particular subject matter expertise.[1220] International criminal procedure consists, in contrast, of a limited two-tiered legal edifice and, therefore, it is not possible to draw the same distinctions between the Trial Chambers and Appeals Chambers of the Ad Hoc Tribunals and the ICC. Thus, the exception drawn from international human rights law is not apt in the context of international criminal procedure.

Even if this differentiation could be overcome, the limited scope of this exception in international human rights law does not allow for the extinguishment of the right to appeal. According to the Explanatory Report to Protocol 7 ECHR, this exemption could be applied "by virtue of […] [one's] status as a minister, judge or other holder of high office, or because of the nature of the offence".[1221] The former basis is arguably prompted by the status of officials under domestic law,[1222] which does not exert binding effect in international criminal procedure. Moreover, the status-based exception concerns exceptional situations in domestic contexts to ensure an appropriate criminal procedure for high-ranking officials, which is too narrow to establish an across-the-board exception to the right to appeal in the proceedings of the Ad Hoc Tribunals and the ICC. In addition, the latter basis has not been invoked before the ECtHR and its boundaries remain, therefore, unclear.[1223] In any event, an exclusion of the right to appeal on the basis of the gravity of the crimes within the jurisdiction of the Ad Hoc Tribunals and the ICC arguably exceeds the discretion permitted under international human rights law when applied in the context of international criminal law. Both the ICCPR and Protocol 7 mandate that any regulation of the appellate process may not infringe the very essence of the right to appeal.[1224] As will be discussed *infra,* such discretion applies, *mutatis mutandis,* in the context of international criminal procedure.[1225] However, considering that the

[1219] L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms … or Tied Down?', 19(3) *Leiden Journal of International Law* 847 (2006), at 865.
[1220] E.g., Views, *Oliveró Capellades v. Spain*, Communication No. 1211/2003, HRC, 11 July 2006, at 4.1.
[1221] Council of Europe, Explanatory Report Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 17, 22 November 1984, at 20.
[1222] E.g., Views, *Serena & Rodríguez v. Spain*, Communications Nos. 1351-1352/2005, HRC, 25 March 2008, at 9.2.
[1223] Part II, Chapter 3.3.4.
[1224] Part II, Chapter 5.1.3.1.
[1225] Part III, Chapter 3.

jurisdictions of the Ad Hoc Tribunals and the ICC exclusively cover international crimes, this would effectively entail a comprehensive absence of appellate review. The fact that such crimes may attract severe consequences for the accused militates, in fact, in favour of the non-applicability of this exception in international criminal law.

2.2.2. Remit of Appellate Recourse

The remit of Article 14(5) ICCPR, Article 2 Protocol 7 ECHR, and, arguably, Article 8(2)(h) ACHR have been explicitly confined to single-level appellate review.[1226] Accordingly, even though the two-tier legal systems of the Ad Hoc Tribunals and the ICC fall out of line with the vast majority of domestic systems of criminal procedure, the lack of a third instance does not trigger any conflict with international human rights law.[1227]

3. Regulation of the Appellate Process

3.1. Ad Hoc Tribunals and ICC

The Statutes of the Ad Hoc Tribunals dedicate a single provision to appellate proceedings, which addresses the bearers of the right to appeal, the grounds of appeal, and the powers of the Appeals Chambers.[1228] The RPE are more specific, setting forth a general rule, which stipulates that "[t]he rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber[s]",[1229] and regulate specific aspects of the appellate procedure, namely the written submissions,[1230] the pre-appeal judge,[1231] the record on appeal,[1232] the date of the appellate hearing,[1233] the admission of additional evidence,[1234] the possibility of an expedited appeals procedure,[1235] the

[1226] Part II, Chapter 5.1.1.4; Part II, Chapter 6.1.
[1227] Accordingly, the issue of access to additional levels of appellate review, as guaranteed by international human rights law, does not arise in the context of the Ad Hoc Tribunals and the ICC. See: Part II, Chapter 5.1.1.4.
[1228] Art. 25 ICTY Statute; Art. 24 ICTR Statute.
[1229] Rule 107 ICTY RPE and ICTR RPE.
[1230] Rules 108, 111, 112, 113 ICTY RPE and ICTR RPE. Rules 116 and 117*ter* ICTR RPE separately regulate the extension of time limits and the submission of written documents, whereas the ICTY RPE omit such rules.
[1231] Rule 108*bis* ICTR RPE. Whereas the ICTY RPE do not contain a similar provision, in one of its first cases, the ICTY Appeals Chamber appointed a pre-appeal judge, based on a combined reading of Rule 65*ter* ICTY RPE, which regulates the duties of a pre-trial judge, and Rule 107 ICTY RPE. See: Order Appointing a Pre-Appeal Judge, *Prosecutor v. Mučić et al.*, Case No. IT-96-21-A, ICTY, Appeals Chamber, 12 October 1999.
[1232] Rules 109, 110 ICTY RPE and ICTR RPE.
[1233] Rule 114 ICTY RPE and ICTR RPE.
[1234] Rule 115 ICTY RPE and ICTR RPE.
[1235] Rule 116*bis* ICTY RPE; Rule 117 ICTR RPE.

judgment on appeal,[1236] and the status of the accused following the appellate procedure.[1237] Besides the Statutes and the RPE, "detailed aspects of the conduct of proceedings before the Appeals Chamber[s]" are addressed in "Practice Directions", which may be issued by "[t]he Presiding Judge of the Appeals Chamber […], in consultation with the President of the Tribunal".[1238] In view of the relative paucity of the legal texts, the appellate process has been subject to additional regulation in the jurisprudence of the Ad Hoc Appeals Chambers.

The appellate process of the ICC has been regulated in a similar manner. The ICC Statute is more elaborate in comparison with the Statutes of the Ad Hoc Tribunals, since it addresses the bearers of the right to appeal,[1239] the grounds of appeal,[1240] custodial issues pending the appellate process,[1241] the execution of the first instance decision and/or sentence,[1242] the powers of the ICC Appeals Chamber,[1243] and the delivery of the judgment.[1244] However, as with the Ad Hoc Tribunals, more specific issues have been reserved for the ICC RPE. Similar to the Ad Hoc RPE, the ICC RPE relating to the appellate process commence with a general provision, which extend the provisions in "Parts 5 and 6 [of the ICC Statute] and rules [of procedure and evidence] governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers […] *mutatis mutandis* to proceedings in the Appeals Chamber",[1245] and continue to regulate specific aspects of the appellate procedure, namely the time limits,[1246] the procedure for filing an appeal,[1247] and the discontinuance of an appeal.[1248] This document is supplemented by the ICC Regulations, which contain, in addition to "provisions relating to all stages of the proceedings",[1249] more detailed regulation concerning the various written submissions,[1250] the variation of the grounds of appeal,[1251] additional evidence,[1252] and

[1236] Rule 117 ICTY RPE; Rule 118 ICTR RPE.
[1237] Rule 118 ICTY RPE; Rule 119 ICTR RPE.
[1238] Rule 107*bis* ICTR RPE.
[1239] Art. 81(1)-(2) ICC Statute.
[1240] Art. 81(1)-(2)(a) ICC Statute.
[1241] Art. 81(3) ICC Statute.
[1242] Art. 81(4) ICC Statute.
[1243] Arts. 81(2)(b)-(c), 83(1)-(3) ICC Statute.
[1244] Art. 83(4)-(5) ICC Statute.
[1245] Rule 149 ICC RPE.
[1246] Rule 150(1)-(2) ICC RPE.
[1247] Rules 150(3), 151 ICC RPE.
[1248] Rule 152 ICC RPE.
[1249] Regulations 19*bis*-44 ICC Regulations.
[1250] Regulations 57-60 ICC Regulations.
[1251] Regulation 61 ICC Regulations.
[1252] Regulation 62 ICC Regulations.

the procedure for consolidated appeals[1253]. Despite this seemingly more elaborate edifice vis-à-vis the Ad Hoc Tribunals, it has been noted that "more weight [will be placed] on the case law and practice of the" ICC in respect of the regulation of its appellate proceedings.[1254]

3.2. Evaluation

International human rights law permits the regulation of the appellate process on the domestic level.[1255] However, it has been remarked that the reference to "law" in Article 14(5) ICCPR and Article 2 Protocol 7 ECHR, on the basis of which the HRC and ECtHR have determined that the appellate process may be regulated, "is so unclear that one wonders if it can really be transposed into an international instrument".[1256] These references clearly express the orientation of these instruments towards domestic systems of criminal procedure. The ICTY Appeals Chamber has held that "[i]t is clearly impossible to classify the organs of the United Nations into the […] divisions which exist in the national law of States".[1257] Such divisions are also non-existent in the context of the ICC. Accordingly, the lack of a legislative process on the international level militates against the extension of an entitlement to regulate the appellate process to the Ad Hoc Tribunals and the ICC.

Even so, on the basis of a contextualised approach to the exigencies of the Ad Hoc Tribunals and the ICC arising out of international human rights law, the Appeals Chambers of the Ad Hoc Tribunals and the ICC must be considered to retain the freedom to regulate their appellate proceedings. The reason is that the Ad Hoc Tribunals and the ICC must, as a matter of practice, regulate their appellate processes. For instance, the Statutes of the Ad Hoc Tribunals and the ICC require, *inter alia,* expeditious proceedings, both as a general feature of the judicial process[1258] and as an aspect of the accused's right to a fair trial,[1259] which necessarily calls for regulatory measures. Therefore, the reference to "law" in international

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[1253] Regulation 63 ICC Regulations.
[1254] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1540.
[1255] Part II, Chapter 5.1.3.1; Part II, Chapter 6.1. The requirement of a "higher" court will be assessed *infra.* See: Part III, Chapter 9.3.2.
[1256] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1539.
[1257] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, ICTY, Appeals Chamber, Case No. IT-94-1, 2 October 1995, at 43.
[1258] Art. 20(1) ICTY Statute (together with Rule 107 ICTY RPE); Art. 19(1) ICTR Statute (together with Rule 107 ICTR RPE); Art. 64(2), (3)(a) ICC Statute (together with Rule 149 ICC RPE).
[1259] Art. 21(4)(c) ICTY Statute; Article 20(4)(c) ICTR Statute; Art. 67(c) ICC Statute.

human rights law, as adjusted to the circumstances of international criminal law, must be considered to encompass regulation through the legal texts of the Ad Hoc Tribunals and the ICC, as well as their jurisprudence. The ECtHR has, in fact, proposed a similar approach in relation to the ECHR. As discussed, Common Law systems rely on unwritten rules to a larger extent than written rules.[1260] In this regard, the ECtHR has determined that references to "law" in the ECHR cover "not only statute but also unwritten law", since "[i]t would clearly be contrary to the intention of the drafters of the […] [ECHR] to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation".[1261] Such an adjustment evidently encompasses the limits attaching to the freedom to regulate the appellate process developed in international human rights law. Accordingly, the appellate processes of the Ad Hoc Tribunals and the ICC may be regulated, provided that such measures neither annul the right to appeal, nor suffer from a lack of clarity/foreseeability to an unreasonable degree or accessibility.[1262]

4. Bearers of the Right to Appeal

4.1. Ad Hoc Tribunals and ICC

The Statutes of the Ad Hoc Tribunals identify "persons convicted by the Trial Chambers" and "the Prosecutor" as those endowed with a right to appeal from a trial judgment.[1263] This enumeration constitutes an exhaustive list. According to the ICTY Appeals Chamber, the Statute leaves "no room for other persons interested in the outcome of the appeal".[1264]

As to the former category, the wording and the jurisprudence of the Ad Hoc Appeals Chambers have given rise to certain limitations. First, the reference to "convicted" persons necessarily excludes acquitted persons from the primary appellate process. In this regard, the ICTY Appeals Chamber has specifically determined that "under Article 25 of the [ICTY]

[1260] Part I, Chapter 1.1.
[1261] E.g., Judgment, *Sunday Times v. The United Kingdom*, Application No. 6538/74, ECtHR, 26 April 1979, at 47; Judgment, *Tolstoy Miloslavsky v. The United Kingdom*, Application No. 18139/91, ECtHR, 13 July 1995, at 37; Judgment, *S.W. v. The United Kingdom*, Application No. 20166/92, ECtHR, 22 November 1995, at 35.
[1262] Part II, Chapter 5.1.3.1.
[1263] Art. 25(1) ICTY Statute; Art. 24(1) ICTR Statute.
[1264] Decision on the Outcome of Proceedings, *Prosecutor v. Delić*, Case No. IT-04-83-A, ICTY, Appeals Chamber, 29 June 2010, at 6. However, other actors may play a role in appeal proceedings by means of, for instance, *amicus curiae* contributions. See: e.g., Brđanin, at 359; Krajišnik, at 8; Nahimana et al., Procedural History, at 14.

Statute […] an acquitted person has no right of appeal from acquittals".[1265] The second limitation is not as obvious. The Ad Hoc Appeals Chambers are also barred from reviewing first instance convictions of those who have deceased before completion of the appellate process. In this regard, the ICTY Appeals Chamber has considered that its "jurisdiction *ratione personae* is limited to living accused or convicted persons",[1266] advancing that: (i) "the personal jurisdiction of the Tribunal is limited to 'natural persons'"; (ii) "Article 25 of the [ICTY] Statute clearly states that '[t]he Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor'"; and (iii) "neither the [ICTY] Statute nor the […] [ICTY RPE] allow for [*sic*] Tribunal's jurisdiction in relation to any procedures initiated by the convicted person's heirs or victims".[1267] Accordingly, in such circumstances, "nothing can undermine the finality of the Trial Judgement".[1268]

With regard to the latter category, according to the ICTY Appeals Chamber, prosecutorial appeals are on an equal footing with defence appeals.[1269] It has found that there is no basis for the claims that "the Prosecution's right to appeal against acquittals should be exercised only exceptionally", that "such an appeal would have to reach a higher threshold of 'diligence'", or that it "would have, as a pre-condition, to serve the 'purposes for which th[e] [International] Tribunal has been created', in a manner different from all other appeals against judgements".[1270] As is well known, the mandates of the prosecutors of the Ad Hoc Tribunals are to investigate and prosecute persons responsible for serious crimes in the former Yugoslavia and Rwanda.[1271] It is, therefore, unsurprising that, in the normal course of events, appeals instituted by the prosecutors seek an aggravation of the position of the accused in comparison with the outcome of the first instance proceedings. However, the appellate role of the prosecutorial authorities of the Ad Hoc Tribunals is not entirely limited to the traditional

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[1265] Order, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, ICTY, Appeals Chamber, 21 March 2000. Also: Delalić et al., Procedural History, at 9. Further: R. Nieto-Navia and B. Roche, 'The Ambit of the Powers under Article 25 of the ICTY Statute: Three Issues of Recent Interest', in R. May, C. Greenwood, and T. McCormack, *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* 473 (The Hague: Kluwer Law International, 2001), at 487-489.
[1266] Decision on the Outcome of Proceedings, *Prosecutor v. Delić*, Case No. IT-04-83-A, ICTY, Appeals Chamber, 29 June 2010, at 6.
[1267] Ibid., at 6. Also: Decision Terminating Appellate Proceedings in Relation to Milan Gvero, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, ICTY, Appeals Chamber, 7 March 2013, at 5-6.
[1268] Decision on the Outcome of Proceedings, *Prosecutor v. Delić*, Case No. IT-04-83-A, ICTY, Appeals Chamber, 29 June 2010, at 15.
[1269] Certain adjustments have, however, been made to the prosecutors' appellate rights. See: Part III, Chapter 9.1.1.2.1.
[1270] Halilović, at 16 (additions in original).
[1271] Art. 16(1) ICTY Statute; Art. 15(1) ICTR Statute.

understanding of an entity pitted against the accused. The Ad Hoc prosecutors have acted in accordance with, or even in favour of, the accused as well. In this regard, the jurisprudence reveals that they have, on certain occasions, supported[1272] or supplemented[1273] allegations of error advanced by the accused. Although it cannot be excluded that the Ad Hoc prosecutors were (in part) motivated by self-interest,[1274] these examples cautiously exhibit a wider commitment to accuracy and fairness inherent in the prosecutorial function on appeal.

However, irrespective of the fact that the Statutes of the Ad Hoc Tribunals explicitly assign the right to appeal to convicted persons and the prosecutors, this right need not be brought into play.[1275] A party may, on its own motion, relinquish its right to appeal.[1276] A variety of reasons may be the basis for such a choice, including acceptance of the outcome of the first instance proceedings, an anticipated lack of success on appeal, and the protracted nature of international criminal proceedings, in relation to which an appeal would further stretch proceedings against a person sentenced to a relatively limited term of imprisonment and eligible for early release. In addition, the right to appeal may also be forfeited pursuant to an agreement between the parties. For instance, a convicted person has agreed not to appeal a sentence within the range proposed by the parties as part of a plea-bargaining deal[1277] and both the convicted person and the ICTY prosecutor have withdrawn their appeals in light of the advanced age and deteriorated health situation of the convicted person.[1278]

Like the Statutes of the Ad Hoc Tribunals, the ICC Statute bestows the right to appeal a decision of conviction or acquittal and/or the sentence onto "the convicted person" and "[t]he Prosecutor".[1279] The explicit references to these parties suggests that this enumeration also constitutes an exhaustive list and, thus, leaves no room for the right to appeal to be exercised

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[1272] E.g., Babić Sentencing Appeal, at 34, 47, 54; Martić, at 164; Zigiranyirazo, at 47.
[1273] E.g., Babić Sentencing Appeal, at 34, 54.
[1274] For instance, in Babić, the Trial Chamber imposed a harsher sentence than the recommendations provided by the prosecution and the defence in their plea-agreement. See: Babić Sentencing Appeal, at 3-4. Thus, the prosecutor's partial support of the defence appeal could arguably also be seen as an attempt to ensure predictable plea-bargaining procedures, so as to ensure the continuing attractiveness of this mechanism for defendants.
[1275] In respect of the right to appeal held by the convicted person, the ICTY Appeals Chamber has determined that the right to appeal must be relinquished in an informed manner. Decision on Strugar's Request to Reopen Appeal Proceedings, *Prosecutor v. Strugar*, Case No. IT-01-42-Misc.1, ICTY, Appeals Chamber, 7 June 2007, at 42.
[1276] E.g., Kvočka et al., at 1; Simić, at 4 (footnote 18); Šainović et al., Annex A – Procedural History, at 12; Popović et al., Annex I: Procedural History, at 5.
[1277] M. Nikolić Sentencing Appeal, at 4. This condition fell through, because the Trial Chamber imposed a harsher sentence than the one agreed upon by the parties.
[1278] Strugar, Annex A – Procedural History, at 13.
[1279] Art. 81(1) ICC Statute.

by other actors in the ICC's judicial process. Thus, notwithstanding the extensive rights of participation to victims in the proceedings at the ICC, these actors do not hold a right to appeal, as such. As held by the ICC Appeals Chamber, "only the Prosecutor and the convicted person, or the prosecutor "on that person's behalf" may appeal a decision" of conviction or acquittal and "victims are not entitled to bring an appeal against such a decision".[1280] However, their right to participate persists on appeal.[1281]

The restrictions pertaining to acquitted and deceased persons set forth by the Ad Hoc Tribunals seem to apply to the ICC Statute as well. Considering that the ICC Statute designates "the convicted person" as the primary addressee of the right to appeal, it would, on a plain reading, deprive acquitted persons of such a right. In addition, the ICC Statute does not foresee the possibility of an appeal filed by other persons on behalf of a deceased person. This must be construed as a deliberate choice, considering that, with regard to revision, the ICC Statute explicitly stipulates that, "after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim […] may apply to the [ICC] Appeals Chamber to revise the final judgement of conviction or sentence".[1282] Similar language would have been employed in respect of appellate proceedings, had the drafters intended such a result.

[1280] Ngudjolo, at 41. Victims' right to appeal an order for reparations through their legal representative on the basis of Article 82(4) ICC Statute is beyond the scope of this research.

[1281] The ICC Appeals Chamber has allowed victim participation on appeal, noting that their personal interests are affected by the appeal "in the same way as during trial", since the relevant appeals were either directed against the entirety of a conviction decision (see: Decision on the Participation of Victims in the Appeals against Trial Chamber I's Conviction and Sentencing Decisions, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 13 December 2012, at 3) or because a person had been acquitted of all charges at trial (see: Decision on the Participation of Victims in the Appeal against Trial Chamber II's "Jugement Rendu en Application de l'Article 74 du Statut", *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, ICC, Appeals Chamber, 6 March 2013, at 3). The participation of victims on appeal consists, in principle, of filing observations on the documents in support of the appeal and/or the responses to these documents, to which the prosecutor and accused may file a response (see: Decision on the Participation of Victims in the Appeals against Trial Chamber I's Conviction and Sentencing Decisions, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 13 December 2012, at 5). However, according to the ICC Appeals Chamber, "the participating victims may make observations as to alleged errors […], even if these alleged errors were not specifically raised by the Prosecutor, as long as they affect the victims' personal interests and remain within the ambit of the Prosecutor's grounds of appeal" (Ngudjolo, at 41). In addition, further modalities of participation may be regulated, such as the questioning of witnesses (Scheduling Order and Decision in Relation to the Conduct of the Hearing before the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 30 April 2014, at 25-26), the filing of observations on applications for additional evidence (Directions under Regulation 62 of the Regulations of the Court, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 21 December 2012, at 10), and presenting observations at the appeal hearing (Further Order regarding the Conduct of the Hearing of the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 25 March 2014, at 2(e)).

[1282] Art. 84(1) ICC Statute.

Furthermore, excluding the grounds of appeal,[1283] the ICC prosecutor's right to appeal is on par with the right to appeal held by the convicted person. In the first appeal against acquittal instituted by the ICC prosecutor, the ICC Appeals Chamber held that the standard of review pertaining to an appeal from a decision of conviction "has equal application for an appeal against an acquittal decision".[1284] However, whereas the Ad Hoc prosecutors have, *de facto*, acted in favour or on behalf of the accused, the ICC Statute mandates that the ICC prosecutor is entitled to do so *de jure*. In this regard, it stipulates that the prosecutor, "on […] [the convicted] person's behalf, may make an appeal", including on the ground of appeal exclusively reserved for the convicted person.[1285] Such an extended mandate is congruent with the more neutral role of the ICC prosecutor foreseen by the ICC Statute, which is largely encapsulated by the imperative that "[t]he Prosecutor shall in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility […], and, in doing so, investigate incriminating and exonerating circumstances equally".[1286] Nevertheless, it has been noted that "[i]t is hard to see why the Prosecutor would want to do this, unless the convicted person has no counsel of his own, or […] his counsel has failed to represent him adequately".[1287] It may, therefore, be expected that the ICC prosecutor will prioritise the habitual prosecutorial function on appeal, in line with his or her responsibility "for conducting investigations and prosecutions before the Court",[1288] as confirmed by the initial appellate practice of the ICC.[1289]

Finally, the ability to refrain from exercising the right to appeal has equal application at the ICC, but it has been more explicitly set forth by the Ad Hoc Tribunals' Statutes and RPE. In this regard, the ICC Statute uses permissive language, setting forth that a "decision of acquittal or conviction or against sentence […] *may* be appealed".[1290] Furthermore, the ICC RPE explicitly provide that, if an appeal is not filed, "the decision [or] the sentence […] of the Trial Chamber shall become final"[1291] and permits "[a]ny party who has filed an appeal […]

[1283] Part III, Chapter 9.2.1.
[1284] Ngudjolo, at 19.
[1285] Art. 81(1)(b) ICC Statute.
[1286] Art. 54(1)(a) ICC Statute.
[1287] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1543.
[1288] Art. 42(1) ICC Statute.
[1289] Lubanga Sentencing Appeal, at 29; Ngudjolo, at 5.
[1290] Art. 81(1) ICC Statute (emphasis supplied). Similar: Rule 150(1) RPE.
[1291] Rule 150(4) ICC RPE.

[to] discontinue the appeal at any time before judgement has been delivered".[1292] The decision not to institute an appeal or to withdraw an appeal at the ICC may be grounded in considerations similar to those applicable to the Ad Hoc Tribunals. For instance, an accused and the ICC prosecutor have concluded an agreement as to the guilty plea of the former, which, *inter alia,* stipulates that he forfeits his right to appeal and that he will not appeal a sentence within a certain range.[1293] In another example, a convicted person discontinued his appeal against his first instance decision of conviction, since he accepted the conclusions adopted therein and expressed his regret to the victims of his acts,[1294] which led the ICC prosecutor to discontinue her appeal against this decision as well.[1295]

4.2. Evaluation

Persons convicted at first instance have been designated as the primary beneficiaries of the right to appeal in Article 14(5) ICCPR and Article 2 Protocol 7 ECHR, whereas Article 8(2)(h) ACHR may be interpreted identically.[1296] The legal texts of the Ad Hoc Tribunals and the ICC explicitly incorporate such a right for convicted persons, directly or indirectly, and, therefore, comply with international human rights law. What is more, the limitations applied by the Ad Hoc Tribunals and the ICC with regard to this right enjoy, or may be considered to enjoy, sufficient support in international human rights law as well. This is uncontroversial as regards the exclusion of acquitted persons from the appellate processes of the Ad Hoc

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[1292] Rule 152(1) ICC RPE. However, according to Rule 152(2) ICC RPE, "[i]f the Prosecutor has filed an appeal on behalf of a convicted person […], before filing any notice of discontinuance, the Prosecutor shall inform the convicted person that he or she intends to discontinue the appeal in order to give him or her the opportunity to continue the appeal proceedings".

[1293] Version Publique Expurgée du «Dépôt de l'Accord sur l'Aveu de Culpabilité de M. Ahmad Al Faqi Al Mahdi», Annex 1, *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, ICC, Defence and OTP, 19 August 2016, at 13, 21(e).

[1294] Defence Notice of Discontinuance of Appeal against the 'Jugement Rendu en Application de l'Article 74 du Statut' rendered by Trial Chamber II on 7 April 2014, Annex A, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, ICC, Defence, 25 June 2014, at p. 2.

[1295] Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, ICC, Prosecutor, 25 June 2014, at 3. However, the prosecutor's withdrawal has elicited disagreement and disappointment from the two groups of victims. See: Observations des Victimes sur le Désistement d'Appel du Procureur contre le Jugement Concernant G. Katanga, *Prosecutor v. Katanga,* Case No. ICC-01/04-01/07, ICC, Le Représentant Légal Commun du Groupe Principal des Victimes, 26 June 2014; Prosecution's Response to the Observations of the Legal Representative of the Main Group of Victims filed on 26 June 2014, *Prosecutor v. Katanga,* Case No. ICC-01/04-01/07, ICC, Prosecutor, 27 June 2014, at 8; Communication du Représentant Légal des Victimes Enfants Soldats Relative au Double Désistement d'Appel dans le Dossier Le Procureur c. Germain Katanga et Annexe Publique, *Prosecutor v. Katanga,* Case No. ICC-01/04-01/07, ICC, Le Représentant Légal des Victimes Enfants Soldats, 30 June 2014; Prosecution's Response to the Communication of the Legal Representative of the Child Soldier Group of Victims, *Prosecutor v. Katanga,* Case No. ICC-01/04-01/07, ICC, Prosecutor, 2 July 2014, at 3.

[1296] Part II, Chapter 5.1.2; Part II, Chapter 6.1.

Tribunals and, arguably, the ICC, considering that such an exception has been explicitly contemplated in the views of the HRC and the judgments of the ECtHR.[1297] The Ad Hoc Tribunals and the ICC have also withheld appellate rights from deceased accused, but the human rights monitoring bodies and courts have not had the opportunity to consider this situation. Even so, the fact that the right to appeal has been specifically assigned to the "convicted" person in international human rights law, taken together with the absence of relevant precedents by the human rights monitoring bodies and courts concerning the possibility for other persons to perpetuate this right on behalf of the deceased person, precludes such an interpretation.

Under international human rights law, the convicted person's right to appeal is not absolute, considering that it may be waived under both the ICCPR and the ECHR, including Protocol 7 thereto.[1298] Accordingly, the forfeiture of appellate rights by convicted persons before the Ad Hoc Tribunals and the ICC, either through a plea agreement or in another manner, enjoys a clear basis in international human rights law. What is more, whereas the position of the ICC Appeals Chamber remains to be determined, the Ad Hoc Tribunals have adopted a cautious approach in respect of the loss of appellate rights, especially in respect of plea agreements. In this regard, recourse to the Ad Hoc Appeals Chambers has not been cut off for those who have been sentenced to a term of imprisonment in accordance with the (upper limit of the) sentencing recommendation contained in the plea agreements.[1299] However, provided that all relevant safeguards concerning the plea agreement have been fulfilled, the right to appeal appears to have been validly relinquished in such circumstances. In fact, the ICTY Appeals Chamber has, in similar circumstances, refused to entertain a sentencing appeal by the ICTY prosecutor, considering that the Trial Chamber had sentenced several persons in accordance with the sentencing range proposed by the ICTY prosecutor.[1300]

The designation of the convicted person as the exclusive holder of a right to appeal entails, at the same time, that international human rights law does not foresee a right to appeal held by prosecutorial authorities. However, there is no doubt that such rights of appeal are, in principle, permissible as a matter of international human rights law. The HRC and the

[1297] Part II, Chapter 5.1.2.
[1298] Ibid.; Part II, Chapter 6.1.
[1299] E.g., Jokić Sentencing Appeal; Bralo Sentencing Appeal.
[1300] Šainović et al., at 8, 9, 11.

IACtHR have denounced the conversion of first instance acquittals into appellate convictions without the possibility of further appellate review, but they have, nonetheless, stopped short of declaring prosecutorial rights to appeal, as such, incompatible with the right to appeal.[1301] Furthermore, this interpretation is supported by a related aspect of the right to a fair trial in international human rights law. Notwithstanding the impossibility of prosecutorial appeals, at least in respect of factual findings, on the basis of the double jeopardy principle in various Common Law systems,[1302] the corresponding norms in international human rights law do not contain an analogous restriction. The ICCPR and Protocol 7 ECHR only disallow a renewed trial or punishment "for an offence for which he has already been *finally* convicted or acquitted in accordance with the law and penal procedure"[1303] of a State, whereas the identical protection enshrined in the ACHR only extends to "an accused person acquitted by a *nonappealable* judgment".[1304] Therefore, these instruments postpone the effects of this guarantee until a final judgment has been pronounced in criminal proceedings, as defined under domestic law. This entails that, prior to that stage, the renewed assessment of the same charges in the appellate phase is permissible. As part of this interpretation, a prosecutorial right to appeal constitutes a necessary precondition to institute such appellate proceedings.[1305]

5. Appellate Representation

5.1. Ad Hoc Tribunals and ICC

5.1.1. Legal Assistance

An accused before the ICTY or ICTR is entitled "to defend himself […] through legal assistance of his own choosing".[1306] This right persists throughout the appellate phase of the proceedings before the Ad Hoc Tribunals. In this regard, the Ad Hoc RPE stipulate that the aforementioned rights "apply to any person detained under the authority of the" Ad Hoc

[1301] Part II, Chapter 5.1.1.3.2. However, whether such convictions are permissible in light of the right to appeal held by the convicted person will be discussed *infra.* See: Part III, Chapter 10.3.1.
[1302] Part I, Chapter 5.1.2.
[1303] Art. 14(7) ICCPR; Art. 4(1) Protocol 7 ECHR (emphasis supplied).
[1304] Art. 8(4) ACHR (emphasis supplied).
[1305] Similar: R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1542-1543.
[1306] Art. 21(4)(d) ICTY Statute; Art. 20(4)(d) ICTR Statute.

Tribunals.[1307] Seeing that the RPE allow for the continued detention of a person convicted at first instance and the renewed detention of a person acquitted at first instance,[1308] this right logically extends beyond proceedings before Trial Chambers. As a general rule, "the same lead and co-counsel who represented the accused at trial will continue to represent him on appeal",[1309] in light of their detailed understanding of the case and the limited amount of time for new counsel to familiarise themselves with the voluminous materials in the record. Even so, the jurisprudence of the Ad Hoc Appeals Chambers contains numerous requests for substitution of (co-)counsel on appeal,[1310] but such requests have been frequently rejected.[1311]

The aforementioned right to legal assistance includes the right to have such "assistance assigned to […] [the accused], in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".[1312] In this regard, the ICTY has developed an "Appeals Legal Aid Policy", which sets forth "the provisions governing the remuneration of Defence counsel assigned by the Registry during the appeal stage of the proceedings".[1313] Although the ICTR lacks such a document, its "Directive on the Assignment of Defence Counsel" contains a right to legal assistance assigned free of charge, who "shall deal with all stages of procedure and all matters arising out of the representation of the suspect or accused or of the conduct of his Defence".[1314] On account of its general language, this provision encompasses the appellate stage too.

With regard to the ICC, this right has been formulated in a similar manner in the ICC Statute, which stipulates that "the accused shall be entitled […] to conduct the defence […] through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where

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[1307] Rule 45*bis* ICTY and ICTR RPE. Also: Arts. 5(iii), 6 ICTY, *Directive on the Assignment of Defence Counsel,* No. 1/94, 11 July 2006; Arts. 1, 2(c), ICTR, *Directive on the Assignment of Defence Counsel,* No. 1/96, 14 March 2008.
[1308] Rules 99(B), 102(A) ICTY and ICTR RPE.
[1309] UNICRI, ADC ICTY, and OSCE ODIHR, *Manual on International Criminal Defence - ADC-ICTY Developed Practices* (Turin: UNICRI Publisher, 2011), at 175.
[1310] E.g., Decision, *Prosecutor v. M. Stanišić*, Case No.IT-08-91-A, ICTY, Registrar, 2 May 2013; Decision, *Prosecutor v. Ojdanić*, Case No. IT-05-87-A, ICTY, Registrar, 20 March 2009; Decision, *Prosecutor v. Šljivančanin*, Case No.IT-95-13/1-A, ICTY, Registrar, 22 January 2008.
[1311] E.g., Delalić et al., Annex A, at 26-28; Kupreškić et al., Annex A: Procedural Background, at 515; Blaškić, Annex A: Procedural Background, at 42; Kordić & Čerkez, Annex A: Procedural Background, at 1104; Kvočka et al., Annex A: Procedural Background, at 749; Rutaganda, Annex A: Appeal Proceedings, at 16-17; Nahimana et al., Annex A: Procedural Background, at 16-20.
[1312] Art. 21(4)(d) ICTY Statute; Art. 20(4)(d) ICTR Statute.
[1313] ICTY, Appeals Legal Aid Policy.
[1314] Arts. 3, 15(a) ICTR, Directive on the Assignment of Defence Counsel, No. 1/96, 14 March 2008.

the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it."[1315] These provisions pertain to the sections of the ICC Statute that "shall apply *mutatis mutandis* to proceedings in the Appeals Chamber",[1316] which entails that these rights do not cease at the conclusion of the first instance proceedings before the ICC. Indeed, in practice, accused have been represented through legal assistance on appeal and legal aid has been administered to indigent appellants at the ICC.[1317]

5.1.2. Self-Representation

Besides the right to be defended "through legal assistance", the Ad Hoc Tribunals' Statutes and RPE also enshrine the accused's right to "defend himself in person".[1318] Accordingly, notwithstanding the idiosyncrasies of international appellate proceedings, accused persons have been allowed to argue their cases on appeal themselves. The ICTY Appeals Chamber has considered that the right to counsel contained in the ICTY statute "draws no distinction between the trial stage and the appeal stage of a case" and that "a review of the case law of domestic jurisdictions does not support a distinction between the trial and appeal stages for purposes of self-representation".[1319] This right may, however, be accompanied by safeguards, as concerns relating to fairness may be heightened. Accused persons acting *pro se* have been, for instance, assisted by an *amicus curiae,* who have been invited "to assist the Appeals Chamber by arguing in favour" of the accused's interests,[1320] defence counsel in respect of a particular ground of appeal,[1321] or a legal advisor with limited rights of audience.[1322]

[1315] Art. 67(1)(d) ICC Statute.
[1316] Rule 149 ICC RPE (emphasis in original).
[1317] E.g., Assembly of States Parties (ICC), *Registry's Single Policy Document on the Court's Legal Aid System*, ICC-ASP/12/3, 4 June 2013, at 31, 42; Decision on Mr Ngudjolo's Request for Review of the Registrar's Decision regarding the Level of Remuneration during the Appeal Phase and Reimbursement of Fees, *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, ICC, Appeals Chamber, 11 February 2014.
[1318] Art. 21(4)(d) ICTY Statute; Art. 20(4)(d) ICTR Statute; Rule 45(F) ICTY RPE and ICTR RPE.
[1319] Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, ICTY, Appeals Chamber, 11 May 2007, at 11-12. Also: Tolimir, Annex A: Procedural History, at 5.
[1320] Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, ICTY, Appeals Chamber, 11 May 2007, at 19.
[1321] Krajišnik, Annex A: Procedural Background, at 8-9.
[1322] Tolimir, Annex A: Procedural History, at 6.

Whereas the ICC Statute also entitles the accused to "conduct the defence in person" in the context of appellate proceedings,[1323] the ICC Appeals Chamber has not determined the scope of this right, since accused persons have not sought to act *pro se* on appeal as of yet.

5.2. Evaluation

5.2.1. Legal Assistance

The right to be defended through legal assistance on appeal, as such, has been entrenched in the views of the HRC and the analogous jurisprudence of the ECtHR.[1324] Furthermore, the right of indigent accused persons to be assigned legal assistance free of charge has been laid down by all three human rights monitoring bodies and courts.[1325] The appellate proceedings of the Ad Hoc Tribunals and the ICC have been conducted in accordance with these obligations, since their legal texts enshrine corresponding rights, which have been operationalised in practice.

In addition, both the HRC and the ECtHR have found that courts' failure to intervene in cases of inadequate legal assistance provided in appellate proceedings may engender the violation of disparate fair trial norms, which does not extend to privately retained counsel.[1326] In light of the high threshold for intervention established by the HRC and the ECtHR, it appears that, in general, the practice of the Ad Hoc Tribunals accords with this obligation. Even though conflicts have arisen in the relationship between convicted persons and appointed counsel in light of the requests to substitute trial counsel for the purpose of appellate proceedings at the Ad Hoc Tribunals, no cases of inadequate assistance of a nature to directly or indirectly annul the convicted person's right to appeal have been recorded. In this respect, the most concerning situation relates to the excessively rigid application of standards of summary dismissal by the Ad Hoc Appeals Chambers in certain situations.[1327] Whereas the ICC Appeals Chamber has not resorted to this measure on such a scale, the Ad Hoc Appeals Chambers have, on occasion, summarily dismissed large parts or even the majority of the grounds of appeal submitted by a

[1323] Art. 67(1)(d) ICC Statute, read together with Rule 149 ICC RPE.
[1324] Part II, Chapter 5.1.4.6.1; Part II, Chapter 6.1.
[1325] Ibid.
[1326] Ibid.
[1327] Part III, Chapter 7.1.5.

party.[1328] This could constitute an indication of inadequate legal assistance, considering that counsel must be deemed to be capable of formulating grounds of appeal in compliance with the relevant standards.[1329] However, even in such cases, the threshold set by the HRC and ECtHR has not been surpassed.[1330] Such conduct has not annulled the facility to appeal the conviction imposed at first instance to such a degree as to require the intervention by the Ad Hoc Appeals Chambers. Indeed, in these circumstances, the Ad Hoc Appeals Chambers have considered the remainder of the grounds of appeal set forth and have, in certain situations, even partially annulled the first instance conviction.[1331]

Finally, as established by the HRC, the right to legal assistance also encompasses the faculty to appoint legal assistance of one's "own choosing" on appeal in relation to privately retained counsel.[1332] In general, the Statutes of the Ad Hoc Tribunals and the ICC feature similarly worded guarantees and the appointment of (co-)counsel on appeal has, in general, proceeded with the agreement of the accused. However, although this matter has not arisen before the ICC, the rejection of requests for the substitution of trial counsel for the purposes of appellate proceedings before the Ad Hoc Appeals Chambers may signal non-compliance. Even so, the majority of these requests have been made in relation to counsel appointed under the legal aid scheme of the Ad Hoc Tribunals, which does not give rise to a right to choose counsel. In any event, even if such requests were made in respect of privately retained counsel, a restrictive position of the Ad Hoc Tribunals appears justified. The relevant view of the HRC concerns an extreme situation, namely the refusal of the replacement of a lawyer retained by the relatives of the co-defendants of the persons concerned and suspected of acting contrary to his interests.[1333] The situations considered by the Ad Hoc Tribunals have not been of a comparable nature. Moreover, it is especially relevant to limit this right to extreme situations in the context of international criminal law, as it may adversely affect the position of the convicted person. The specific, complex, and voluminous cases before the Appeals Chambers of the Ad Hoc Tribunals (and the ICC) require familiarity with the case at hand to ensure a

[1328] E.g., Vasiljević, at 23; Krajišnik, at 427-647; Brđanin, at 18-31 (combined with the application of these principles in the judgment); Mrkšić & Šljivančanin, at 214; Milošević, at 48; Krnojelac, at 18-27, 55; Martić, at 16-21 (combined with the application of these principles in the judgment).
[1329] E.g., HRC, *General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32, 23 August 2007, at 51; Judgment, *Czekalla v. Portugal*, Application No. 38830/97, ECtHR, 10 October 2002, at 65-66.
[1330] Part II, Chapter 5.1.4.6.1; Part II, Chapter 6.1.
[1331] E.g., Vasiljević, at p. 60-61; Krajišnik, at p. 279; Brđanin, at p. 162-163; Milošević, at p. 144-145.
[1332] Part II, Chapter 5.1.4.6.1.
[1333] Views, *Y.M. v. Russia*, Communication No. 2059/2011, HRC, 31 March 2016, at 2.3.

fully argued and expeditious appellate process. This militates strongly in favour of retention of trial counsel as a general rule, to which limited exceptions should be made.

5.2.2. Self-Representation

International human rights law permits self-representation on appeal and acknowledges restrictions imposed in this respect.[1334] The legal framework of the Ad Hoc Tribunals is in accordance with a maximalist interpretation of this right. The general limitation to the right to self-representation identified by the HRC, which relates to, *inter alia, "*cases of persons […] facing a grave charge but being unable to act in their own interests",[1335] as well as the specific limitation developed by the ECtHR, which allows for obligatory representation by counsel at the expense of the right to self-representation concerning appellate proceedings requiring particular legal knowledge,[1336] appear especially relevant in respect of international criminal law.[1337] In light of the gravity of the offences within the jurisdictions of the Ad Hoc Tribunals, the repercussions for the accused may be very grave and the appellate procedures of the Ad Hoc Tribunals and the ICC have been circumscribed in a specific manner and require particular legal skills.[1338] Accordingly, depending on the specific circumstances, the limitation of such rights would not inherently contravene the right to self-representation. Even so, as discussed, the Ad Hoc Appeals Chambers have expressly permitted self-representation on appeal, in conjunction with compensatory safeguards to secure an effective appeal.

6. Composition of Ad Hoc and ICC Appeals Chambers

6.1. Ad Hoc Tribunals and ICC

Seven of the permanent judges of the Ad Hoc Tribunals are members of the Appeals Chambers, which are, for each appeal, composed of five of its members.[1339] The judges of the Appeals Chambers are appointed to specific benches by the president of the ICTY, in

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[1334] Part II, Chapter 5.1.4.6.2; Part II, Chapter 6.1.
[1335] HRC, General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 37.
[1336] Part II, Chapter 5.1.4.6.2.
[1337] Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, ICTY, Appeals Chamber, 11 May 2007, Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation.
[1338] Part III, Chapter 9.
[1339] Art. 12(3) ICTY Statute; Art. 11(3) ICTR Statute. Pursuant to Article 13(4) ICTR Statute, "[t]he members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda".

accordance with his or her responsibility for the coordination of the work of the Chambers.[1340] In this regard, no distinctions have been drawn between judges of the Trial Chambers and Appeals Chambers in respect of their qualifications and election.[1341] Accordingly, the "rotation principle" applies, which entails that "[p]ermanent Judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber".[1342]

Alike judges of the Trial Chambers, judges of the Ad Hoc Appeals Chambers may be subject to disqualification. The following principles guide the Ad Hoc Appeals Chambers "in interpreting and applying the impartiality requirement of the Statute: A. [a] Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if: (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties […] or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".[1343] Applications for the disqualification of judges of the Ad Hoc Appeals Chambers have, for instance, been based on a judge's prior involvement in the assessment of a trial judge's independence and impartiality[1344] and a judge's nationality in combination with a prior political position[1345].

The aforementioned rotation principle also entails certain consequences in respect of the impartiality requirement. In general, the Ad Hoc Appeals Chambers have held that the judges "sometimes involved in several trials which, by their very nature, cover issues that overlap" and that "[i]t is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case".[1346] In addition, according to the Ad Hoc RPE, the involvement of a judge of the Trial Chamber in the review of an indictment against an accused does not disqualify that judge from "sitting as a member of the

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[1340] Rule 19(1) ICTY RPE. The jurisprudence reveals that the benches of the Ad Hoc Appeals Chambers undergo frequent changes before the issuance of a judgment. E.g., Blaškić, Annex A: Procedural Background; at 34-38; Nzabonimana, Annex A: Procedural History, at 10; Nyiramasuhuko et al., Annex A: Procedural History, at 23, 25; Popović et al., Annex I: Procedural History, at 4; Stanišić & Simatović, Annex I: Procedural History, at 1.
[1341] Arts. 13, 13*bis* ICTY Statute; Arts. 12, 12*bis* ICTR Statute.
[1342] Rule 27 ICTY RPE, which applies, *mutatis mutandis,* to the ICTR by virtue of Article 13(4) ICTR Statute.
[1343] Nahimana et al., at 49. Also: Rule 15 ICTY and ICTR RPE.
[1344] Delalić et al., Annex A, at 22-25.
[1345] Order on Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal, *Prosecutor v. Martić*, Case No. IT-95-11-A, ICTY, Vice-President, 23 October 2007.
[1346] Nahimana et al., at 78.

Appeals Chamber to hear any appeal in that case".[1347] Accordingly, after confirming the indictment against an accused, certain judges have been assigned to the appellate bench of the same case.[1348] However, the Ad Hoc Statutes also set forth that "[n]o Judge shall sit on any appeal in a case in which that Judge sat as a member of the Trial Chamber".[1349]

Turning to the ICC, a difference and a similarity arise in the composition of the ICC Appeals Chamber in comparison with the Ad Hoc Tribunals. Commencing with the former, the ICC Statute only provides for appellate adjudication by an undivided Appeals Chamber, as opposed to the formation of appellate benches by the Ad Hoc Appeals Chambers. In this regard, it stipulates that "[t]he Appeals Division shall be composed of the President and four other judges",[1350] that "[t]he Appeals Chamber shall be composed of all the judges of the Appeals Division",[1351] and that the "Judges assigned to the Appeals Division shall serve in that division for their entire term of office".[1352] On the other hand, like the Ad Hoc Appeals Chambers, "[t]here is no hierarchy between the judges of the [ICC] Appeals Chamber […] and the judges of the other [ICC] Chambers".[1353] In this regard, "all judges of the ICC are elected in the same way, irrespective of whether they will serve in the Pre-Trial, Trial, or Appeals Chambers of the" ICC.[1354] The ICC Statute indicates that "the assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court" and that "[t]he Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience".[1355] These criteria "are based on the specific functions of the [ICC Appeals]

[1347] Rule 15(C) ICTY RPE.
[1348] E.g., Judge Robinson in Boškoski & Tarčulovski (see: Decision on Review of the Indictment, *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-I, ICTY, Reviewing Judge, 9 March 2005 and Boškoski & Tarčulovski) and Judge Agius in Stanišić & Simatović (see: Judgment, *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, ICTY, Trial Chamber I, 30 May 2013, Appendix A: Procedural History, at 2419 and Stanišić & Simatović). Whereas Judge Agius dissented from the judgment of the Appeals Chamber in part, he agreed with the majority that the Trial Chamber had erred in respect of the acquittal of the accused. See: Stanišić & Simatović, Separate and Partially Dissenting Opinion of Judge Carmel Agius, at 2. However, a judge has withdrawn on his own motion from an appellate bench because of his involvement in pre-trial matters in the same case. See: Order of the Vice-President for the Assignment of Judges to the Appeals Chamber, *Prosecutor v. Mučić et al.*, Case No. IT-96-21-A, ICTY, Appeals Chamber, 20 January 1999.
[1349] Rule 15(D)(i) ICTY RPE.
[1350] Art. 39(1) ICC Statute.
[1351] Art. 39(2)(b)(i) ICC Statute.
[1352] Art. 39(3)(b) ICC Statute.
[1353] V. Nehrlich, 'The Role of the Appeals Chamber', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* 963 (Oxford: Oxford University Press, 2015), at 965.
[1354] Ibid., at 964.
[1355] Art. 39(1) ICC Statute.

Chamber, but not in the sense that the [ICC] Appeals Chamber is hierarchically superior".[1356] Further underlying the judges' equality, the ICC Regulations stipulate that, "[i]n the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, the Presidency shall, in the interests of the administration of justice, attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division".[1357]

Furthermore, the ICC's conditions as to disqualification and combination of judicial roles are largely similar to those existing at the Ad Hoc Tribunals. The ICC's legal texts allow for the disqualification of a judge of the ICC Appeals Chamber upon request of "[t]he Prosecutor or the person being investigated or prosecuted"[1358] where "his or her impartiality might reasonably be doubted on any ground".[1359] For instance, a request for recusal has been deposed, because "certain public statements made by the Judge [allegedly] adversely affected the appearance of his impartiality, or possibly evinced actual bias on his part" and "the involvement of the Judge in a particular organisation […] [allegedly] gave rise to a personal interest in the outcome of the appeals […] [or] was 'manifestly likely' to create a conflict of interest in which the Judge's impartiality might reasonably be called into question".[1360] Furthermore, as in the Ad Hoc Tribunals, participation by the same judge in the trial and appellate phase of the same case has been explicitly excluded.[1361] However, the ICC Statute imposes stricter conditions in respect of the compatibility of judges' prior engagements and subsequent membership of the Appeals Chamber in respect of the same case. It stipulates that "[u]nder no circumstances shall a judge who has participated in the pre-trial […] phase of a case be eligible to sit on the Appeals Chamber hearing that case […]".[1362] Indeed, appellate

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[1356] V. Nehrlich, 'The Role of the Appeals Chamber', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* 963 (Oxford: Oxford University Press, 2015), at 965.
[1357] Regulation 12 ICC Regulations.
[1358] Art. 41(2)(b) ICC Statute. However, Rule 35 ICC RPE stipulates that "[w]here a judge […] has reason to believe that a ground for disqualification exists in relation to him or her, he or she shall make a request to be excused and shall not wait for a request for disqualification to be made […]".
[1359] Art. 41(2)(a) ICC Statute. This Article provides that "[a] judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted". Rule 34(1) ICC RPE contains further grounds for disqualification.
[1360] Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the Case of the Prosecutor v. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, ICC, Plenary of Judges, 11 June 2013, at 4.
[1361] Regulation 12 ICC Regulations.
[1362] Ibid.

judges have recused themselves because they have issued arrest warrants and confirmed charges regarding the same person.[1363]

6.2. Evaluation

6.2.1. Superiority

It may appear that particular compositions of the Ad Hoc and ICC Appeals Chambers negate or mitigate their hierarchical superiority vis-à-vis the relevant Trial Chambers. The rotation principle operated by the Ad Hoc Tribunals and the possibility to temporarily attach judges from the Pre-Trial and Trial Divisions of the ICC to the ICC Appeals Chamber allows first instance judges to become part of the mechanism that should exercise control over them.

However, the consequences of the requirement of appellate review by "higher" tribunals or courts, which is contained all three human rights instruments, have not been specifically elucidated in the views and jurisprudences of the human rights monitoring bodies and courts.[1364] Instead, the ability to provide appellate review of sufficient scope has been emphasised.[1365] As will be set out below,[1366] the scope of the appellate review provided by the Ad Hoc and ICC Appeals Chamber complies with this overriding criterion. Accordingly, it cannot be concluded that the mixed compositions of certain appellate benches of the Ad Hoc and ICC Appeals Chambers, as such, violate international human rights law.

6.2.2. Impartiality

The appellate proceedings of the Ad Hoc and ICC Appeals Chambers have proceeded in accordance with the general norms concerning impartiality established in international human rights law.[1367] The recusal mechanisms set forth in their legal texts, which define criteria resembling those set forth by the human rights monitoring bodies and courts, have been applied to the judges of the Ad Hoc and ICC Appeals Chambers.

[1363] E.g., Decision Replacing Judges in the Appeals Chamber, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, ICC, Presidency, 19 March 2014; Decision Replacing Judges in the Appeals Chamber, *Prosecutor v. Ngudjolo,* ICC, Presidency, Case No. ICC-01/04-02/12, 20 December 2012; Decision Replacing a Judge in the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Presidency, 7 September 2012.
[1364] Part II, Chapter 5.1.3.2; Part II, Chapter 6.1.
[1365] Ibid.
[1366] Part III, Chapter 9; Part III, Chapter 10.
[1367] Part II, Chapter 5.1.4.3; Part II, Chapter 6.1.

However, with respect to the specific consequences of the impartiality requirement for appellate proceedings,[1368] the legal frameworks and/or the practical application of the relevant norms of the Ad Hoc Tribunals fall short of the applicable standards developed in international human rights law in general or in particular situations. Whereas the ICC's appellate process is, in part, aligned with these norms, certain aspects may also give rise to violations of the impartiality requirement in future proceedings.

First, in contrast to the ICC, the Ad Hoc Tribunals' legal texts do not structure their appellate processes in a manner to preclude the impermissible accumulation of judicial functions in the same case. Whereas the ICC Statute specifically excludes the involvement of a judge in, on the one hand, the appellate phase and, on the other hand, either the pre-trial or trial proceedings in the same case, the Ad Hoc Tribunals' RPE only disallow the participation of the same judge in the trial and appeal phase of the same case and permit combined pre-trial and appeal adjudication. The confirmation of an indictment before the Ad Hoc Tribunals requires the establishment of a "*prima facie* case",[1369] which has been defined as "a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge".[1370] Thus, if the indictment is confirmed, the judge in question believes that it has been *prima facie* established that the person concerned has "committed the crimes with which […] [he or she is] charged".[1371] Such an evaluation entails that, if the case progresses to appeal after trial at first instance, the person concerned will be confronted with a judge who has formed an opinion on (aspects of) his or her criminal responsibility to a *prima facie* standard. Both the HRC and the ECtHR have specifically rejected similar combinations of judicial functions in pre-trial proceedings concerning preliminary charges and appellate proceedings regarding the merits of a judgment.[1372] It has been maintained that this standard "is not totally equivalent to proof of guilt beyond reasonable doubt" and "only documentary sources" are considered, which does not entail examination of the "evidence *stricto sensu*".[1373] These arguments are thoroughly unconvincing. The test is whether the judges' involvement is such as to allow them to form an opinion regarding the culpability of the

[1368] Ibid.
[1369] Art. 19(1) ICTY Statute; Art. 18(1) ICTR Statute. Also: Rule 45 ICTY and ICTR RPE.
[1370] E.g., Decision on Review of the Indictment, *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-I, ICTY, Reviewing Judge, 9 March 2005, at 2.
[1371] Ibid., at 2.
[1372] Part II, Chapter 5.1.4.3; Part II, Chapter 6.1.
[1373] S. Zappalà, 'The Rights of the Accused', in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the ICC: a Commentary* 1319 (Oxford: Oxford University Press, 2002), at 1335.

accused.[1374] This test does not require uniformity between the standards of assessment relevant to pre-trial proceedings and appellate proceedings or the type of evidence considered in such proceedings. Indeed, it is conceivable that, even though pre-trial proceedings involve a lower standard of assessment or evidence of less exacting standards, a judge forms an opinion regarding the culpability of the accused.

Second, the Ad Hoc Tribunals have not completely averted intolerable assessments of the criminal liability of the same person by the same judge in distinct judgments in particular situations. The proceedings before the Ad Hoc and ICC Appeals Chambers may involve separate trials of persons alleged to have been involved in similar or identical events of a massive scale. Despite the formal disconnect between these cases, the theories of perpetration employed by the Ad Hoc Tribunals and the ICC often establish a close association between the persons concerned, most notably through the application of joint criminal enterprise and direct or indirect co-perpetration. This has led certain judges of the Ad Hoc Appeals Chambers to express opinions on (aspects of) the individual criminal responsibility of persons who have been closely involved in the events under consideration, even though these persons were not parties to the appellate proceedings in question. Subsequently, these judges have sat on appellate benches regarding the appeals from first instance judgments of the persons in respect of whom determinations as to culpability had already been made in a previous judgment. For instance, in Seromba, the ICTR Appeals Chamber concluded that "Seromba approved and embraced as his own the decision of Kayishema, Ndahimana, Kanyarukiga, Habarugira, and other persons to destroy the church in order to kill the Tutsi refugees".[1375] However, the latter four persons were not on trial in the Seromba case, but two of them, i.e. Ndahimana and Kanyarukiga, would be tried before the ICTR on partially overlapping charges after the conclusion of the Seromba trial. And yet, two judges who had been part of the Seromba Appeals Chamber have also sat on either the Ndahimana or Kanyarukiga Appeals Chambers,[1376] which have confirmed similar findings of the Trial Chambers on the responsibility of Ndahimana and Kanyarukiga concerning the same events.[1377] Similar

[1374] Views, *Larrañaga v. the Philippines*, Communication No. 1421/2005, HRC, 24 July 2006, at 7.9; Judgment, *Ionuţ-Laurenţiu Tudor v. Romania*, Application No. 34013/05, ECtHR, 24 June 2014, at 77-87.
[1375] Seromba, at 171. Similar: ibid., at 177.
[1376] Judge Robinson was part of the Kanyarukiga Appeals Chamber and Judge Meron sat on the Ndahimana Appeals Chamber.
[1377] E.g., Kanyarukiga, at 172-229; Ndahimana, at 59-74.

situations have arisen in the jurisprudence of the ICTY Appeals Chamber.[1378] This is not, as considered by the Ad Hoc Appeals Chambers, merely a situation of judicial involvement in "several trials which […] cover issues that overlap".[1379] On the contrary, the judges in question had already pre-judged aspects of the third persons' culpability, even before their first instance trials on these charges had been completed. Even if the assessment provided in a preceding case is not determinative or binding, the person in question will have to appear before judges, who are vested with the power to make the final determination of guilt in his or her case, but who have already provided an indication as to their opinion in regards of the most crucial aspect of the appellate process. This scenario has been explicitly declared, or may be considered, incompatible with international human rights law.[1380]

7. Access to the Appeals Chambers

7.1. Ad Hoc Tribunals and ICC

As discussed, convicted persons and the prosecutors have an automatic right of appeal before the Ad Hoc Tribunals and the ICC, which may be exercised at their discretion.[1381] Such a right does not, however, entail guaranteed access to the Appeals Chambers. Impediments have been set up, which concern, as the case may be, the "raise or wave" rule, a reasoned opinion provided by a Trial Chamber, and formal requirements for access to the appellate process in the form of time-limits, word-limits, and the form of written submissions.[1382]

7.1.1. Raise or Waive Rule

A specific outgrowth of the possibility to waive the right to appeal is the obligation imposed on parties to preserve issues for appellate review during first instance proceedings before the Ad Hoc Tribunals. In this respect, the ICTY Appeals Chamber has ruled that a "party cannot remain silent on […] [a] matter [at trial] only to return on appeal to seek a trial *de novo*."[1383]

[1378] E.g., Judge Pocar in Krstić, at 102-106 and Popović et al., at 483; Judge Güney in Vasiljević, at 32-86 and Lukić & Lukić, at 121-145.
[1379] Nahimana et al., at 78.
[1380] Part II, Chapter 5.1.4.3; Part II, Chapter 6.1.
[1381] Part III, Chapter 4.
[1382] Accordingly, the remaining issues that have been addressed in connection with the right of access to an appellate court in international human rights law are not of relevance to the Ad Hoc Tribunals and the ICC. See: Part II, Chapter 5.1.4.1.
[1383] Tadić, at 55.

Accordingly, where a party fails to raise an issue at trial, it waives its right to argue it on appeal,[1384] although limited exceptions have been carved out in this regard.[1385]

It remains unclear whether this doctrine applies at the ICC. It has been noted that, "[i]n the text prepared by the Preparatory Committee, Article 82 [ICC Statute] provided that the accused would only be able to raise defences in the appeal proceedings which had already been raised in the Trial Chamber or if resulting from the proceedings in that Chamber", but that "[t]his provision was deleted because many delegations asserted that such a provision would preclude fresh evidence which arises after the trial and would penalize an accused whose defence counsel had not raised certain pleadings and evidence at the trial".[1386] Accordingly, the exclusion of such a qualifier militates against an application of the "raise or waive" rule. However, the delegates appeared to be mainly concerned with the possible preclusion of fresh evidence and, as will be discussed, the legal texts of the ICC permit the presentation of such evidence in appellate proceedings under certain circumstances.[1387] What is more, the ICC Appeals Chamber has come close to applying the "raise of waive" rule in practice. In summarily dismissing a ground of appeal, it has referred to the failure of an appellant to raise certain issues before a Trial Chamber, even though it ultimately rejected it on a different basis, namely a failure to substantiate the allegation of error.[1388]

7.1.2. Reasoned Opinion at First Instance

The Ad Hoc Trial Chambers are required to render a judgment "accompanied by a reasoned opinion in writing".[1389] In addition to the fact that this requirement constitutes "an aspect of the fair trial requirement" contained in the Ad Hoc Statutes,[1390] it serves a procedural goal too. In the words of the ICTY Appeals Chamber, it "enables a useful exercise of the right of appeal […]" and "allows the [ICTY] Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of the evidence".[1391]

[1384] E.g., Furundžija, at 174; Akayesu, at 361; Kambanda Sentencing Appeal, at 25; Blaškić, at 222; Naletilić & Martinović, at 21; Simić, at 212.
[1385] E.g., Ndindabahizi, at 66 (alibi defence); Niyitegeka, at 200 (notice of the charges).
[1386] P. De Cesari, 'Observations on the Appeal before the International Criminal Court', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: a Challenge to Impunity* 225 (Aldershot: Ashgate, 2001), at 229.
[1387] Part III, Chapter 9.2.
[1388] Lubanga, at 135-136.
[1389] Art. 23(2) ICTY Statute; Art. 22(2) ICTR Statute.
[1390] Furundžija, at 69. Also: e.g., Hadžihasanović & Kubura, at 13; Musema, at 18.
[1391] Kunarac et al., at 41. Also: e.g., Babić Sentencing Appeal, at 17.

On the basis of this rationale, the obligation imposed on ICC Trial Chambers to provide a reasoned opinion must also be considered to exert accessorial effects in relation to ICC appellate proceedings.[1392] Indeed, although the ICC Appeals Chamber has not dealt with this issue as a specific ground of appeal, it has invoked similar considerations. It has stressed "that, for reasons of clarity, the [ICC] Appeals Chamber's ability to review impugned decisions, and an effective and meaningful right to appeal, [ICC] Trial Chambers should set out with clarity which factual findings are the basis for each of the elements of a crime".[1393]

7.1.3. Time Limits

The Ad Hoc Tribunals have defined specific time limits for each written document in the appellate process. A party signals its intent to invoke its right to appeal by filing a notice of appeal within thirty days from the date on which it is pronounced.[1394] Within seventy-five days of filing the notice of appeal, an appellant's brief shall be filed.[1395] A "Respondent's brief of argument and authorities shall be filed within forty days of filing of the Appellant's brief".[1396] Finally, "[a]n Appellant may file a brief in reply within fifteen days of filing of the Respondent's brief".[1397] The latter three documents are subject to shortened deadlines when limited to sentencing, namely thirty, thirty, and ten days, respectively.[1398] These limits may be varied or "any act done after the expiration of a time-limit" may be recognised.[1399]

The situation is similar at the ICC. Within thirty days of notification of a decision of conviction or acquittal or a sentence, a notice of appeal must be filed.[1400] Thereafter, within ninety days of notification of the relevant decision, the appellant must file a document in

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[1392] Art. 74(5) ICC Statute. Although the ICC Statute does not impose an explicit obligation on the Trial Chamber to provide reasons for the sentence, such an obligation may be deduced from the obligations of the Trial Chamber to take into account "the evidence presented and submissions made during the trial that are relevant to the sentence" (Art. 76(1) ICC Statute); "such factors as the gravity of the crime and the individual circumstances of the convicted person" (Art. 78(1) ICC Statute); and additional factors set forth in Rule 145 ICC RPE. Indeed, Trial Chambers have provided reasons in respect of the first sentencing decisions of the ICC in connection with the first conviction decisions. See: Decision on Sentence pursuant to Article 76 of the Statute, *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, ICC, Trial Chamber I, 10 July 2012; Decision on Sentence pursuant to Article 76 of the Statute, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, ICC, Trial Chamber II, 23 May 2014.
[1393] Lubanga, at 313. Similar: Lubanga, at 222.
[1394] Rule 108 ICTY and ICTR RPE.
[1395] Rule 111 ICTY and ICTR RPE.
[1396] Rule 112 ICTY and ICTR RPE.
[1397] Rule 113 ICTY and ICTR RPE.
[1398] Rules 111-113 ICTY and ICTR RPE.
[1399] ICTY, Practice Direction on Formal Requirements for Appeals from Judgement, No. IT/201, 7 March 2002, at 17.
[1400] Rule 150 ICC RPE; Regulation 57 ICC Regulations.

support of the appeal.[1401] The opposing side may file a response within sixty days of notification of the document in support of the appeal.[1402] An extension of these limits is possible "for good cause, upon the application of the party seeking to file the appeal".[1403]

7.1.4. Word Limits

Appellate briefing has been subject to word limits at the Ad Hoc Tribunals and the ICC. The former have limited the appeal brief, respondent's brief, and reply brief to 30,000, 30,000, and 9,000 words, respectively.[1404] The latter allows 100, 100, and 50 pages to be devoted to the document in support of the appeal, the response and, if applicable, a reply, respectively.[1405] Variations of these limits may be allowed upon request by a party, provided that "exceptional circumstances" necessitating the oversized filing have been demonstrated at the Ad Hoc Tribunals[1406] and "good cause" has been established at the ICC[1407].

7.1.5. Form of Written Submissions

The Ad Hoc Appeals Chambers have, in general, attached considerable importance to parties' written submissions. As stated by the ICTY Appeals Chamber, "[i]n a primarily adversarial system, like that of the […] [ICTY], the deciding body considers its case on the basis of the arguments advanced by the parties" and "[i]t thus falls to the parties appearing before the [ICTY] Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner".[1408]

It has, subsequently, developed stringent formal criteria attaching to the form the Parties' written submissions must take. Appellants and respondents must "clearly set out […] grounds of appeal as well as the arguments in support of each ground", "set out the arguments supporting the contention that the alleged error has invalidated the decision or occasioned a

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[1401] Regulation 58 (1)-(2) ICC Regulations. The grounds of appeal may be varied in accordance with Regulation 61 ICC Regulations. Furthermore, the procedure concerning a prosecutorial appeal in cases involving multiple appeals is set forth in Regulation 63 ICC Regulations.
[1402] Regulation 59(1) ICC Regulations. Furthermore, the procedure concerning a prosecutorial response in cases involving multiple appeals is set forth in Regulation 63 ICC Regulations.
[1403] Rule 150(2) ICC RPE.
[1404] ICTY, *Practice Direction on the Length of Briefs and Motions*, No. IT/184 Rev. 2, 16 September 2005, at 1. If an appeal is limited to sentencing, the appeal brief and respondent's brief must be limited to 12,000 words and the reply brief to 3,000 words.
[1405] Regulations 58(5), 59(2), 60(2) ICC Regulations.
[1406] ICTY, Practice Direction on the Length of Briefs and Motions, No. IT/184 Rev. 2, 16 September 2005, at 7.
[1407] Rule 150(2) ICC RPE.
[1408] Kunarac et al., at 43.

miscarriage of justice", "provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support", and give "references to paragraphs in judgements, transcript pages, exhibits or other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made".[1409]

Consonant with this position, the ICTY Appeals Chamber has concluded that it may exercise "its inherent discretion in selecting which submissions of the parties merit a 'reasoned opinion' in writing".[1410] Accordingly, it has declared, in general, that it "will dismiss, without providing detailed reasons, those Appellants' submissions in the briefs or the replies or presented orally during the Appeal Hearing which are evidently unfounded".[1411] This approach has subsequently been referred to "summary dismissal".[1412] In more specific terms, the Ad Hoc Appeals Chambers have initially specified three categories of arguments liable for summary dismissal, namely: "1. the argument of the appellant is clearly irrelevant; 2. it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appellant; or 3. the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber".[1413]

As their jurisprudence matured, the Appeals Chambers expanded or further specified these categories. A general list comprising ten grounds for summary dismissal has been developed: "(i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the Trial Chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the Trial Chamber did; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that

[1409] Ibid., at 44 (also: 45). Also: Part III, Chapter 10.
[1410] Kunarac et al., at 47.
[1411] Ibid., at 48.
[1412] E.g., Brđanin, at 17-31; Strugar, at 18-24; Martić, at 16-21.
[1413] Kunarac et al., at 48.

were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error; and (x) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner". [1414] Furthermore, additional grounds have been set forth in the jurisprudence. Although these matters have not been categorised as grounds for summary dismissal, they function as such, considering that the Appeals Chambers have refused to entertain such arguments on the merits. Examples concern arguments that exceed the notice of appeal[1415] and failures to distinguish between the legal or factual nature of an alleged error[1416].

However, the Ad Hoc Tribunals' approach to summary dismissal displays considerable variance. In this regard, an accommodating and a strict stance may be identified. The accommodating approach may be exemplified as follows. First, summary dismissal has been applied as a measure of last resort. For instance, the ICTY Appeals Chamber has proceeded to summarily dismiss grounds of appeal only after reminding an appellant "of the criteria for appeal at the appeal hearing" and requesting him "to clarify some of the issues raised in the Defence Appeal Brief and in the Additional Defence Brief".[1417] This approach falls in line with the Practice Direction on Formal Requirements for Appeals from Judgement. In respect of non-compliance, it stipulates that "a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing", although "[t]he Appeals Chamber may also reject a filing or dismiss submissions therein".[1418] Accordingly, it does not foresee dismissal as an automatic sanction. Second, arguments have been admitted that fall short of the aforementioned formal requirements. A typical example concerns the dismissal of a ground of appeal for failure to comply with the standards for summary dismissal, accompanied by a conclusion that it cannot succeed on the merits either. For instance, the ICTR Appeals Chamber has noted that, "[i]n addition to […] [the] failure to properly raise this ground of appeal in the Notice of Appeal,

[1414] Milošević, at 17. Also: Brđanin, at 17-31; Strugar, at 18-24; Martić, at 16-21.
[1415] E.g., Kupreškić, at 469-470; Vasiljević, at 15.
[1416] Haradinaj et al., at 289. However, the Appeals Chambers have frequently omitted to attach any consequences to erroneous classifications of errors, failures to specify the type of error committed, or arguments advancing combined errors of fact and law. E.g., Akayesu, at 241; Ntakirutimana & Ntakirutimana, at 298; Renzaho, at 318; Krnojelac, at 183; Kvočka et al., at 77; Boškoski & Tarčulovski, at 61, 69; Nizeyimana, at 352-354.
[1417] Vasiljević, at 14. Also: Aleksovski, at 8; Halilović, at 48-52.
[1418] ICTY, Practice Direction on Formal Requirements for Appeals from Judgement, No. IT/201, 7 March 2002, at 17.

[…] the present submission lacks merit".[1419] Another example relates to an assessment that a ground of appeal falling short of the standards of summary does not lead to dismissal on procedural grounds but, instead, on substantive grounds. In this regard, the ICTY Appeals Chamber has noted that an appellant had "merely suggested an interpretation of the facts at odds with that of the Trial Chamber",[1420] but, as opposed to a summary dismissal on this basis, it has concluded that the appellant had "failed to show that the Trial Chamber erred".[1421] In justification of the admission of formally defective arguments, the Ad Hoc Appeals Chambers have invoked: a lack of prejudice for the opposing party;[1422] the need to ensure heightened fairness where an appellant is exercising his right to self-representation;[1423] the fact that the Appeals Chambers are judicial instances of last resort;[1424] the importance of the issues at stake;[1425] or their discretion[1426]. The strict approach is primarily reflected in the outright dismissal of grounds of appeal for lack of compliance with formal standards and without a remedial avenue or an assessment of the merits, either with regard to specific arguments[1427] or as part of an *in limine* collective dismissal of deficient arguments.[1428]

[1419] Ntakuritimana & Ntakuritimana, at 370-371. Also: Kunarac et al., at 331-334; Bizimungu, at 296; Nzabonimana, at 21; Strugar, at 80; Đorđević, at 97.
[1420] Martić, at 90.
[1421] Ibid., at 90. Also: Kvočka et al., at 250-255; Galić, at 198; Ntakuritimana & Ntakuritimana, at 315-325; Kalimanzira, at 50; Strugar, at 129; Karera, at 239.
[1422] E.g., Deronjić Sentencing Appeal, at 102-103, 129; Martić, at 229; Šainović et al., at 84; Popović et al., at 489; Naletilić & Martinović, at 410; Gacumbitsi, at 11, 47; Simba, at 12; Karera, at 375.
[1423] E.g., Krajišnik, at 651, 748; Tolimir, at 184, 418.
[1424] E.g., Kambanda Sentencing Appeal, at 55.
[1425] E.g., Niyitegeka, at 200; Kamuhanda, at 21; Babić Sentencing Appeal, at 83; Deronjić Sentencing Appeal, at 103; Galić, at 99; Limaj et al., at 74; Nahimana et al., at 174.
[1426] E.g., Kayishema & Ruzindana, at 177; Niyitegeka, at 263; Kamuhanda, at 133 (footnote 281); Nchamihigo, at 56; Nyiramasuhuko et al., at 568 (footnote 1288), 3309 (footnote 7568); 3348 (footnote 7671). For a critique of this approach, see: Nyiramasuhuko et al., Dissenting and Separate Opinion of Judge Agius, at 46-47, who has claimed that it has led to unequal treatment.
[1427] In respect of arguments exceeding the notice of appeal, see: e.g., Naletilić & Martinović, at 155, 172 (footnote 370), 412; Blagojević & Jokić, at 54 (footnote 147); Mrkšić & Šljivančanin, at 369; Haradinaj et al., at 19; Akayesu, at 275-276; Ntagerura et al., at 338, 349; Karera, at 374. In respect of repetition of trial arguments, see: e.g., Lukić & Lukić, at 523, 646; Hadžihasanović & Kubura, at 45; Mrkšić & Šljivančanin, at 214; Milošević, at 48; Kvočka et al., at 425; Naletilić & Martinović, at 254; Brđanin, at 35; Ndindiliyimana et al., at 97; Nzabonimana, at 16. In respect of failures to raise errors of law or fact, see: e.g., Kupreškić et al., at 24; Kvočka et al., at 314, 447-448; Limaj et al., at 45. In respect of failures to substantiate alleged errors of fact or law, see: e.g., Babić Sentencing Appeal, at 91; Kordić & Čerkez, at 127; Deronjić Sentencing Appeal, at 62; Kvočka et al., at 687; Stakić, at 206; Martić, at 42; Simba, at 99; Nzabonimana, at 16; Kayishema & Ruzindana, at 177; Rutaganda, at 48. In respect of failures to refer to specific findings of the Trial Chamber, see: e.g., Galić, at 189; Rutaganda, at 48. In respect of challenges to findings on which a trial judgment did not depend, see: e.g., Simba, at 99; Nchamihigo, at 102; Munyakazi, at 12 (footnote 27), 129; Kupreškić et al., at 23.
[1428] E.g., Vasiljević, at 13, 16-22, 23; Krnojelac, at 18-27. Also: Halilović, at 25-27, 43-56, 106, 135, 152, 169-170; Bagosora & Nsengiyumva, at 435; Renzaho, at 258; Niyitegeka, at 249-262. For a critique of the ICTY Appeals Chamber's failure to apply this approach, see: Popović et al., Separate and Dissenting Opinion of Judge Mandiaye Niang, at 7-8.

Turning to the ICC, the Appeals Chamber has also stressed the importance of the parties' written submissions, although in less forceful terms than the Ad Hoc Appeals Chambers. It has held that "the appellant is required to set out the alleged error and how the alleged error materially affected the impugned decision".[1429] Whether sufficient substantiation has been provided depends "on the specific argument raised, including the type of error alleged".[1430]

In addition, its approach to summary dismissal is highly comparable to the Ad Hoc Tribunals' practice. It has held that, if an appellant fails to comply with the requirement of substantiation, "the [ICC] Appeals Chamber may dismiss the argument without analysing it in substance".[1431] What is more, its practice has been affected by predicaments analogous to those encountered at the Ad Hoc Tribunals. In this regard, it has oscillated between a strict approach, according to which defective arguments have been dismissed pursuant to a failure to comply with the standards concerning the form of written submissions,[1432] and a flexible approach, which has allowed for an assessment of defective arguments.[1433]

7.2. Evaluation

7.2.1. Raise or Waive Rule

The "raise or waive" rule has not been specifically considered in the views or jurisprudence of the HRC, ECtHR, or the IACtHR. Although the HRC has noted that the impossibility of raising issues on appeal that have not been argued at trial may preclude a finding of ineffective legal representation,[1434] it has not determined that a "raise or waive" rule is, as such, compatible or incompatible with fair trial standards. Accordingly, such an impediment falls to be considered under the general discretion to regulate the appellate process.[1435]

[1429] Lubanga, at 30.
[1430] Ibid., at 31.
[1431] Ibid., at 30. E.g., Lubanga, at 135-136, 153, 170, 183, 201, 262, 383; Ngudjolo, at 251-252.
[1432] In respect of the failure to challenge a finding, see: e.g., Lubanga, at 155, 169; Lubanga Sentencing Appeal, at 117-118. In respect of the misrepresentation of a Trial Chamber's findings and/or the ignoring of other relevant findings, see: e.g., Lubanga, at 165, 174, 212, 411-412, 478-479. In respect of mere disagreement with a finding of a Trial Chamber, see: e.g., Lubanga, at 175, 507; Ngudjolo, at 198, 218. In respect of the speculative character of an argument, see: e.g., Lubanga, at 226. In respect of the repetition of arguments raised at trial, see: e.g., Lubanga, at 248, 440, 448. In respect of the fact that a Trial Chamber ultimately did not rely on an impugned finding, see: e.g., Lubanga, at 343.
[1433] E.g., Lubanga, at 148, 160, 238, 265, 455, 480, 518; Ngudjolo, at 207, 287.
[1434] Part III, Chapter 2.2.3.
[1435] Part III, Chapter 3.

Whereas the status of the "raise of waive" rule in ICC appellate proceedings remains ambiguous and cannot, therefore, be assessed,[1436] the resort to such a rule by the Ad Hoc Tribunals may be considered permissible under international human rights law, provided that its application complies with the outer limits of this discretion. This is, arguably, the case. The "raise or waive" rule does not, as such, annul the right to appeal. In light of the enormous scope of the cases dealt with by these institutions, this rule seeks to keep appellate procedures within reasonable bounds, by disallowing an unbridled expansion of the case vis-à-vis proceedings at first instance. If the convicted person presents his or her case in full at the first opportunity, unrestricted recourse to the Ad Hoc Appeals Chambers may be had. Moreover, the legal texts of the Ad Hoc Tribunals contain an important safeguard. The "raise or waive" rule is counterbalanced by the possibility of admitting additional evidence on appeal, which allows for issues to be raised in appellate proceedings that could not have been reasonably anticipated at first instance.[1437] The "raise or waive" rule also does not suffer from a lack of accessibility or clarity/foreseeability to an unreasonable degree. The rule has been made available through the jurisprudence of the Ad Hoc Tribunals and, despite the existence of certain exceptions, which mainly operate to the benefit of the convicted person, it has been applied relatively consistently.

7.2.2. Reasoned Opinion at First Instance

Under international human rights law, a reasoned opinion by a court of first instance serves to ensure access to the appellate process.[1438]

This principle has, in general, been heeded in the jurisprudence of the Ad Hoc Tribunals. The accused are, in the normal course of events, provided either immediately with the written first instance judgment or soon after the public reading of the summary thereof. In addition, remedial measures have been taken when Trial Chambers have failed to discharge their responsibilities in this respect. In this regard, in light of a Trial Chamber's "manifest failure to provide a reasoned opinion", the ICTR Appeals Chamber has, in order to safeguard the accused's "right to an effective appeal", ordered that the appellate proceedings concerning the accused in question be severed from his co-accused and additional submissions on the

[1436] Part III, Chapter 7.1.1.
[1437] Part III, Chapter 10.
[1438] Part II, Chapter 5.1.4.1; Part II, Chapter 6.1.

evidentiary basis for the accused's conviction be filed.[1439] It went on to consider that, in light of the additional submissions, the accused "has had a full and focused opportunity to appeal his […] conviction and to respond to the Prosecution's case in this regard".[1440]

Although the approach of the ICC Appeals Chamber is more ambiguous, it does not appear to exceed the limits established in the views of the HRC and the jurisprudence of the ECtHR. It has considered, on one occasion, that "the reasoning of the Trial Chamber […] could have been more extensive".[1441] On another occasion, it has noted that the lack of separate consideration of an element of an offence had "led to some ambiguity and […] confusion on the part of" the accused,[1442] but concluded that "the Trial Chamber's findings relevant to that element were nonetheless discernable [*sic*] and reviewable".[1443] Considering that both the HRC and the ECtHR permit a more limited degree of reasoning in this context,[1444] the ICC Appeals Chamber's determinations appear to fall within the outer limits of the aforementioned norms. Even so, it would have been preferable for the ICC Appeals Chamber to specifically set forth why the accused's access to appellate review had not been affected, in light of the difficulty it itself admitted to have in reviewing the impugned findings.[1445]

7.2.3. Time Limits

Pursuant to international human rights law, appellate processes may, in principle, be subject to time limits.[1446] Thus, the application of time limits by the Ad Hoc Tribunals and the ICC is, in principle, acceptable. In this regard, there is no indication in the jurisprudence of the Appeals Chambers that time limits have been applied in a manner specifically rejected by the HRC and the ECtHR. In fact, more generally, the Ad Hoc Tribunals and the ICC allow for flexibility to avoid unwarrantedly adverse effects regarding the essence of the right to appeal. They permit time limits to be extended in certain circumstances[1447] and, in respect of the Ad Hoc Tribunals, transgressions of time limits by convicted persons have been condoned.[1448]

[1439] Bizimungu, at 19-20 (also: 29-30). Similar: Nyiramasuhuko et al., at 733, 737.
[1440] Bizimungu, at 19-20 (also: 32). Similar: Nyiramasuhuko et al., at 734, 737.
[1441] Lubanga, at 222.
[1442] Ibid., at 312.
[1443] Ibid., at 312.
[1444] Part II, Chapter 5.1.4.1.
[1445] Lubanga, at 222, 312.
[1446] Part II, Chapter 5.1.4.1; Part II, Chapter 6.1.
[1447] Part III, Chapter 7.1.3.
[1448] E.g., Milošević, at 10. Conversely, belated filings submitted by the ad hoc prosecutors have, on occasion, been discarded in full. See: e.g., Kayishema & Ruzindana, at 16-49 (refusal to consider entire appeal of ICTR prosecutor); Blaškić, at 675 (refusal to consider supplementary brief in respect of additional evidence).

7.2.4. Word Limits

Considering that the human rights monitoring bodies and courts have not specifically assessed the compatibility of word limits attaching to written appellate arguments with the various conceptions of the right to appeal, resort must be had to the general discretion to regulate the appellate process under international human rights law.[1449]

In this regard, the application of word limits by the Ad Hoc Tribunals and the ICC is, arguably, in compliance with the outer limits of the discretion to regulate the appellate process. The application of this requirement has not led to the complete annulment of the right to appeal in the jurisprudence of the Ad Hoc Tribunals and the ICC, seeing that they permit relatively extensive appellate briefing, as balanced against the need to restrain the scope of appellate proceedings,[1450] and all Appeals Chambers have granted variations of the word limits on a frequent basis.[1451] Furthermore, the application of the word limits to written appellate arguments is neither unreasonably unclear/unforeseeable nor inaccessible, as such limits have been defined in the legal texts of the Ad Hoc Tribunals and the ICC, whereas applications for extensions must be approved by the Appeals Chambers.[1452]

7.2.5. Form of Written Submissions

The forms of written submissions on appeal have not been assessed against the relevant standards of appellate fairness by either the HRC or the regional human rights courts. However, these requirements bear some resemblance to leave to appeal proceedings. They could, in theory, entail a complete lack of access to the Appeals Chambers of the Ad Hoc Tribunals and the ICC, if written submissions would, in their entirety, fall short of the relevant standards for admission to the appellate process. Even so, unlike typical leave to appeal proceedings, the Appeals Chambers of the Ad Hoc Tribunals and the ICC do not directly engage in a preliminary review of to the chances of success on appeal, although some standards of summary dismissal seem to approximate such an assessment. Accordingly, the approaches of the Appeals Chambers of the Ad Hoc Tribunals and the ICC to the form of

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[1449] Part III, Chapter 3.
[1450] Part III, Chapter 7.1.4.
[1451] E.g., Nyiramasuhuko et al., Annex A: Procedural History, at 3, 13; Stanišić & Simatović, Annex A: Procedural History, at 4; Popović et al., Annex I: Procedural History, at 5-7; Šainović et al., Annex A – Procedural History, at 2, 5, 6; Mugenzi & Mugiraneza, Annex A – Procedural History, at 3-4; Lubanga, Annex 3, at 3 (footnote 9), 16; Ngudjolo, Annex 2, at 75, 78, 79.
[1452] Part III, Chapter 7.1.4.

written submissions on appeal are not to be contrasted against standards of appellate fairness applicable to leave to appeal proceedings, as developed in international human rights law. Instead, such requirements fall within the general discretion of the Ad Hoc Tribunals and the ICC to regulate their appellate procedures.[1453]

No firm conclusion may be reached in respect of the developing jurisprudence of the ICC Appeals Chamber.[1454] However, the practical application of these requirements by the Ad Hoc Tribunals is, irrespective of the question whether they extinguish the right to appeal or are accessible, not reconcilable with the need to ensure a reasonable degree of clarity/foreseeability in the regulation of appellate proceedings. As discussed, the practical application of these requirements has fluctuated immensely. Defective arguments have either been subject to remedial avenues or have been admitted for consideration on the merits in a large number of cases.[1455] Conversely, appellate arguments suffering from comparable defects have been rejected without remedial recourse or additional assessment on the merits in many other cases.[1456] The Ad Hoc Appeals Chambers have not provided clear guidelines in respect of the procedural consequences attaching to non-compliance with the formal requirements pertaining to written arguments. Nor have they explained the particular discrepancies in the outcomes of comparable cases in an appropriate manner.

8. Written or Oral Argument

8.1. Ad Hoc Tribunals and ICC

8.1.1. Written Submissions

Written submissions concerning the merits of an appeal are provided over four stages at the Ad Hoc Tribunals. In its notice of appeal, a party is required to "identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought".[1457] An appellant's brief

[1453] Part III, Chapter 3.
[1454] Part III, Chapter 7.1.5.
[1455] Part III, Chapter 7.1.5.
[1456] Ibid.
[1457] Rule 108 ICTY and ICTR RPE. Also: ICTY, *Practice Direction on Formal Requirements for Appeals from Judgement*, No. IT/201, 7 March 2002, at 1.

must set out all the arguments and authorities.[1458] The opposing side may file "[a] Respondent's brief of argument and authorities",[1459] which must contain "for each ground of appeal, in the following order: (a) a statement on whether or not the relief sought by the Appellant is opposed; (b) a statement on whether or not the ground of appeal is opposed; (c) arguments in support of these statements".[1460] Finally, the appellant may file "a brief in reply",[1461] which must be "limited to arguments in reply to the Respondent's Brief".[1462]

The appellate proceedings of the ICC are conducted in a similar manner. The notice of appeal is mainly of a formal nature and must indicate "(a) [t]he name and number of the case; (b) [t]he date of the decision of conviction or acquittal, sentence or reparation order appealed against; (c) [w]hether the appeal is directed against the whole decision or part thereof; [and] (d) [t]he relief sought".[1463] The document in support of the appeal "shall contain the grounds of appeal", consisting of "[t]he ground of appeal" and "[t]he legal and/or factual reasons in support of the ground of appeal".[1464] It must further comply with certain formal criteria by referring to "the relevant part of the record or any other document or source of information as regards any factual issue", setting out references "to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof" for legal arguments, and "[w]here applicable, the finding or ruling challenged in the decision shall be identified, with specific reference to the page and paragraph number".[1465] The opposing side may file a response to this document, which, in addition to the aforementioned references concerning legal and factual issues,[1466] must answer "[e]ach ground of appeal […] separately, stating whether it is opposed, in whole or in part, together with the grounds put forward in support thereof" and state "whether the relief sought is opposed, in whole or in part, together with the

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[1458] Rule 111 ICTY and ICTR RPE. According to this Rule, "[w]here limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal […]". Also: ICTY, *Practice Direction on Formal Requirements for Appeals from Judgement*, No. IT/201, 7 March 2002, at 4.
[1459] Rule 112 ICTY and ICTR RPE. According to this Rule, "[w]here limited to sentencing, a Respondent's brief shall be filed within thirty days of filing of the Appellant's brief".
[1460] ICTY, Practice Direction on Formal Requirements for Appeals from Judgement, No. IT/201, 7 March 2002, at 5.
[1461] Rule 113 ICTY and ICTR RPE. According to this Rule, "[w]here limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief".
[1462] ICTY, Practice Direction on Formal Requirements for Appeals from Judgement, No. IT/201, 7 March 2002, at 6.
[1463] Rule 150 ICC RPE; Regulation 57 ICC Regulations.
[1464] Regulation 58 (1)-(2) ICC Regulations. The grounds of appeal may be varied in accordance with Regulation 61 ICC Regulations. Furthermore, the procedure concerning a prosecutorial appeal in cases involving multiple appeals is set forth in Regulation 63 ICC Regulations.
[1465] Regulation 58(3) ICC Regulations.
[1466] Regulation 59(1)(b)-(c) ICC Regulations.

grounds of opposition in support thereto".[1467] However, contrary to the Ad Hoc Tribunals, the ICC appellate procedure does not allow for a reply as of right. Such a document may only be filed where the ICC Appeals Chamber orders an appellant to do so whenever it "considers it necessary in the interests of justice".[1468] It has determined, in this regard, that, "[a]lthough not specifically mentioned in […] the [ICC] Regulations […], an appellant may request, and accordingly, trigger the powers of the [ICC] Appeals Chamber to order the filing of a reply under said regulation".[1469] A reply "must not repeat submissions made previously".[1470]

8.1.2. Appellate Hearings

Following the filing of the written submissions, the Ad Hoc Appeals Chambers "shall set the date for the [appeal] hearing".[1471] This hearing allows, primarily, for the presentation of the parties' arguments. However, it is not an opportunity for the parties to restate their written submissions. Instead, as held by the ICTY Appeals Chamber, the parties "should confine their oral arguments to elaborating on points […] that they wish to bring to the Appeals Chamber's attention".[1472] Furthermore, "the parties are to focus their oral arguments on the grounds of appeal raised in their briefs […]", considering that "[…] the appeals hearing is not the occasion for presenting new arguments on the merits of the case".[1473] Such arguments will, in principle, not be considered in the judgments of the Ad Hoc Appeals Chambers.[1474] The Ad Hoc Appeals Chambers have, however, displayed some flexibility in this regard, by allowing parties to supplement written submissions at appeal hearings.[1475] Furthermore, the Ad Hoc Appeals Chambers have sought additional clarifications from the parties at appellate hearings. In this regard, they have, for instance, requested the parties to respond to specific questions

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[1467] Regulation 59(1)(a) ICC Regulations. Furthermore, the procedure concerning a prosecutorial response in cases involving multiple appeals is set forth in Regulation 63 ICC Regulations.
[1468] Regulation 60(1) ICC Regulations. Furthermore, the procedure concerning a prosecutorial reply in cases involving multiple appeals is set forth in Regulation 63 ICC Regulations.
[1469] Order on the Filing of a Reply under Regulation 60 of the Regulations of the Court, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 21 February 2013, at 6.
[1470] Ibid., at 8.
[1471] Rule 114 ICTY and ICTR RPE.
[1472] Order Re-Scheduling Appeal Hearing, *Prosecutor v. B. Simić*, Case No. IT-95-9-A, ICTY, Appeals Chamber, 5 May 2006, at 4. Also: Decision on Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing, *Nahimana et al. v. the Prosecutor*, Case No. ICTR-99-52-A, ICTR, Appeals Chamber, 5 December 2006, at 4.
[1473] Decision on Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing, *Nahimana et al. v. the Prosecutor*, Case No. ICTR-99-52-A, ICTR, Appeals Chamber, 5 December 2006, at 4.
[1474] E.g., Haradinaj et al., at 19.
[1475] E.g., Naletilić & Martinović, at 128; Mrkšić & Šljivančanin, at 350-361 (footnote 1188).

arising out of their written submissions[1476] or to provide their views on issues raised by the Ad Hoc Appeals Chambers *proprio motu.*[1477] In addition, appellate hearings have served to allow the Ad Hoc Appeals Chambers to *proprio motu* summon witnesses.[1478]

Conversely, an oral hearing is not a mandatory affair at the ICC. The provision on the procedure on appeal does not provide for such a hearing[1479] and, according to the ICC Appeals Chamber, there is no support for the contention that it was "'the drafters' intention […] that an oral hearing would be the norm for final appeal'", since "they would have specifically stated so".[1480] It has further held that "the case law of other international criminal tribunals and, to a certain extent, the jurisprudence on internationally recognised human rights lend support to the notion that an oral hearing may be held".[1481] However, considering that most other international tribunals, including the Ad Hoc Tribunals, "have mandatory hearings because their rules expressly require such hearings", it has concluded that, "absent an explicit provision in the Court's statutory framework mandating an oral hearing, any such hearing can only be discretionary".[1482] It seems, nevertheless, that the ICC Appeals Chamber has adopted a broad approach in this regard. Appellate hearings have been conducted, either without specifying the need to do so[1483] or by merely noting that it "would be useful in assisting the [ICC] Appeals Chamber in its decision-making process".[1484] As with the Ad Hoc Tribunals, such hearings serve to allow the parties to present arguments. Although the ICC Appeals Chamber has not provided extensive guidance, it has stipulated that any relevant issue arising in the appeal may be addressed within the confines of the written submissions.[1485]

[1476] E.g., Simić, at 75; Brđanin, at 270; Mrkšić & Šljivančanin, at 37; Zigiranyirazo, Annex A – Procedural History, at 9; Nyiramasuhuko et al., at 725.
[1477] E.g., Karera, at 360; Boškoski & Tarčulovski, at 19.
[1478] E.g., Stakić, Annex A: Procedural Background, at 23.
[1479] Rule 151 ICC RPE.
[1480] Scheduling Order for a Hearing before the Appeals Chamber, *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, ICC, Appeals Chamber, 18 September 2014, at 12.
[1481] Ibid., at 12.
[1482] Ibid., at 12.
[1483] Scheduling Order for a Hearing before the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 21 March 2014, at 1(b).
[1484] Scheduling Order for a Hearing before the Appeals Chamber, *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, ICC, Appeals Chamber, 18 September 2014, at 13.
[1485] Further Order regarding the Conduct of the Hearing of the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 25 March 2014, at 2(d)(iv); Order in Relation to the Conduct of the Hearing before the Appeals Chamber, *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, ICC, Appeals Chamber, 8 October 2014, at 2.

8.2. Evaluation

8.2.1. Orality

Pursuant to Article 14(1) ICCPR and Article 6(1) ECHR, both the HRC and the ECtHR have required oral hearings for appellate instances empowered to consider both facts and law and to revisit the question of guilt or innocence.[1486] Considering that the Appeals Chambers of the Ad Hoc Tribunals and the ICC boast corresponding prerogatives,[1487] they are, as a matter of international human rights law, obliged to conduct such hearings.

Accordingly, the combination of written submissions and an obligatory oral hearing at the Ad Hoc Tribunals is in, in principle, in compliance with the general requirement to include an oral component in the appellate process.[1488] However, the ICC Appeals Chamber has determined that the ICC Statute does not mandate such hearings, but that they may be permitted as a discretionary measure following written arguments. Whereas this ruling falls short of standards of international human rights law in general, no specific violation has occurred in the early jurisprudence of the ICC Appeals Chamber, in light of its broad approach, on the basis of which oral hearings have been conducted as a matter of course.

8.2.2. Presence

The HRC and the ECtHR have both established that the accused has a right to appear in person where: (i) an appellate court is entitled to determine matters of law and fact and to address guilt or innocence; and (ii) prosecutorial authorities have been authorised to appear.[1489] Accordingly, in view of their far-reaching powers, the Ad Hoc and ICC Appeals Chambers are under an obligation to allow an accused person to appear in person.[1490]

Although the Ad Hoc Tribunals do not specifically set forth a right of the accused to be present on appeal, but only stipulate that "the Registrar shall notify the parties" of the date of the appellate hearing,[1491] and the ICC conducts oral hearings as a matter of discretion,[1492] this right has been effectively applied pursuant to the obligatory hearings conducted before the Ad

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[1486] Part II, Chapter 5.1.4.2; Part II, Chapter 6.1.
[1487] Part III, Chapter 9; Part III, Chapter 10.
[1488] However, see: Part III, Chapter 10.3.4.
[1489] Part II, Chapter 5.1.4.4; Part II, Chapter 6.1.
[1490] Part III, Chapter 9; Part III, Chapter 10.
[1491] Rule 114 ICTY and ICTR RPE. See: Part III, Chapter 8.1.2.
[1492] Part III, Chapter 8.1.2.

Hoc Appeals Chambers and the broad approach adopted by the ICC Appeals Chamber.[1493] Furthermore, in practice, such proceedings have not been conducted in the presence of the Ad Hoc and ICC prosecutors and to the exclusion of accused persons before either institution.

9. Scope of Appellate Review

9.1. Ad Hoc Tribunals

9.1.1. Appeal from the Merits

The jurisdiction of the Appeals Chambers of the Ad Hoc Tribunals has been specifically circumscribed to two grounds: "an error on a question of law invalidating the decision" and "an error of fact which has occasioned a miscarriage of justice".[1494] The use of the connector "or", coupled with the lack of an open-ended category, points towards an exhaustive list of errors. Therefore, this structure implies a perfect dichotomy, according to which a ground of appeal is defined as either an error of law or an error of fact. In light of the wording of the Ad Hoc Statutes, these grounds of appeal will be discussed separately,[1495] notwithstanding certain contradictory signals as to the mutual exclusivity of these categories.[1496]

Before turning to these grounds of appeal, the general character of the appellate review of the Ad Hoc Tribunals' Appeals Chambers needs to be set out. The circumscription of their

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[1493] Ibid.
[1494] Art. 25(1)(a)-(b) ICTY Statute; Art. 24(1)(a)-(b) ICTR Statute.
[1495] A more detailed discussion is beyond the scope of this study.
[1496] Certain aspects of the jurisprudence of the Ad Hoc Tribunals support the dichotomy implicit in the wording of the Ad Hoc Statutes. For instance, it has been decided that, where a ground of appeal ultimately seeks to impugn a factual finding, the standard of review relative to errors of fact has been applied to the exclusion of the standard of review concerning errors of law (e.g., Aleksovski, at 73; Ntakirutimana & Ntakirutimana, at 174; Blagojević & Jokić, at 145; Milošević, at 18). In addition, the Appeals Chambers have requalified alleged errors of fact into errors of law (e.g., Muhimana, at 166 (footnote 386); Simba, at 291, 294). However, the Ad Hoc Tribunals' jurisprudence also contains pervasive indications as to a lack of distinction between these errors. In this regard, the Appeals Chambers have, explicitly and implicitly, broadened the grounds of appeal foreseen by the ICTY and ICTR Statutes, by defining a category of "a mixed error of law and fact" (e.g., Strugar, at 252 (also: at 269)) and by considering closely intertwined allegations of errors of law and errors of fact together (e.g., Limaj et al., at 159, 222, 278, 318; Kajelijeli, at 29, 158-160, 182. Similar: Zigiranyirazo, at 51, 73; Blagojević & Jokić, at 300-303; Kalimanzira, at 186; Renzaho, at 319-320). The Ad Hoc Appeals Chambers have also proceeded in a general manner without clearly specifying the type of error committed by a Trial Chamber. For instance, the ICTY Appeals Chamber has found that a Trial Chamber had committed "an error" (e.g., Gotovina & Markač, at 61) and, according to a dissenting judge, it had not characterised it "either as an error of fact or as an error of law" (Gotovina & Markač, Dissenting Opinion of Judge Carmel Agius, at 6. Adding further to the uncertainty, another dissenting judge has indicated that this error "ultimately constitutes an error of law", as it was used as a "legal tool" for witness credibility (Gotovina & Markač, Dissenting Opinion of Judge Fausto Pocar, at 10)). Similar examples may be identified in the jurisprudence of the Ad Hoc Appeals Chambers (e.g., Tadić, at 183; Kordić & Čerkez, at 355-360; Orić, at 47; Šainović et al., at 550; Mrkšić & Šljivančanin, at 61-62; Aleksovski, at 64).

jurisdiction to errors of law and fact entails, *inter alia,* that a trial judgment is not subject to *de novo* review on appeal, as has been confirmed repeatedly in the jurisprudence.[1497] Such review has been interpreted to encompass the autonomous reassessment of the matters at issue, in whole or in part. This is established by the ICTY Appeals Chamber's rejection of the argument that it should "conduct an independent assessment of the evidence, both as to its sufficiency and its quality" and "inquire whether a reasonable trier of fact could have found that an inference or hypothesis consistent with innocence of the offence charged was open on the evidence".[1498] It has concluded, in this respect, that it "does not operate as a second Trial Chamber" and that its role "is limited, pursuant to […] the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice".[1499] It has further considered that, "[u]nlike the procedures in force in some national systems, the appeals procedure provided for under […] the ICTY Statute is, by nature, corrective".[1500]

Certain approaches to appellate litigation have been dismissed by the Appeals Chambers as a result of this principle. It has mainly been considered that it is "totally inadmissible" "to question the entire proceedings and to challenge most of the findings of the Trial Chamber that appeared to be unfavourable to" the party.[1501] This characterisation of the appellate process also affects the type of evidentiary material considered by the Appeals Chambers. The ICTY Appeals Chamber has found that it will only consider "evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal".[1502] In its justification, it has held that "[t]o hold otherwise would mean to hold a trial *de novo* […] merely based on documentary evidence including transcripts" and it has noted "that it is not obliged by […] the […] [RPE] to review *proprio motu* the entire trial record".[1503]

9.1.1.1. Error of Law

According to the Ad Hoc Appeals Chambers, an error of law could arise "from the application of a wrong legal standard by a Trial Chamber".[1504] On this basis, a wide array of substantive

[1497] Furundžija, at 38; Krnojelac, at 3; Rutaganda, at 15.
[1498] Furundžija, at 38.
[1499] Ibid., at 40.
[1500] Krnojelac, at 5.
[1501] Rutaganda, at 15. Also: Musema, at 17. Similar: Kajelijeli, at 89.
[1502] Kordić & Čerkez, at 21.
[1503] Ibid., at 21 (footnote 12).
[1504] Blaškić, at 15.

and procedural matters of a legal nature have been reviewed on appeal. Recurring examples include the definitions of crimes[1505] and modes of liability[1506] within the Ad Hoc Tribunals' jurisdiction, the specificity of the charges levelled against the accused,[1507] and the Trial Chambers' obligation to provide a reasoned opinion in writing.[1508]

The ICTY Appeals Chamber has considered that "[e]rrors of law do not raise a question as to the standard of review as directly as errors of fact", since, "as the final arbiter of the law of the Tribunal, [it] must determine whether there was such a mistake".[1509] It has, thus, intimated that it would accord no deference to Trial Chambers' findings of law on account of its status as a Chamber of last resort within the ICTY's legal edifice. Subsequently, the lack of deference has been concretely laid down by the ICTR Appeals Chamber. It has held that it "does not cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed to determine whether they are correct".[1510]

In addition to establishing an error of law, the appealing party must "demonstrate that the error renders the decision invalid".[1511] There has been a lack of general guidance by the Ad Hoc Appeals Chambers as to this matter, however. For instance, the Ad Hoc Appeals Chambers have often stated in a conclusory manner that an appellant has not demonstrated that an alleged error of law has invalidated the impugned judgment.[1512] Even so, the Ad Hoc appellate jurisprudence indicates that the words "invalidating the judgement" primarily entail an assessment as to whether an error of law fatally undermines the basis for the impugned finding. In this regard, the Appeals Chambers have frequently found that errors of law concerning particular elements of a Trial Chamber's analysis were inconsequential, since the remainder of its analysis sufficiently supported the impugned finding,[1513] the error of law had been committed in relation to issues insignificant to appellants' liability,[1514] or that such errors

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[1505] E.g., Kunarac et al., at 116-124, 127-133, 142-156, 161-166; Blaškić, at 94-128; Stakić, at 14-28; Kalimanzira, at 155-160.
[1506] E.g., Blaškić, at 33-51; Brđanin, at 389-425; Perišić, at 25-40.
[1507] E.g., Đorđević, at 579-696; Ntagerura et al., at 115-165; Muvunyi I, at 13-32, 33-47, 89-101, 102-113, 149-158; Nchamihigo, at 339-344.
[1508] E.g., Perišić, at 96; Nzabonimana, at 383; Nyiramasuhuko et al., at 733.
[1509] Furundžija, at 35. Also: Rutaganda, at 20.
[1510] Rutaganda, at 20. Also: Krnojelac, at 10. Further: Part III, Chapter 10.1.1.2.1.
[1511] Furundžija, at 36. It may be noted that the Appeals Chambers have caused some confusion in this respect by considering whether the conviction was "not safe" or "unsafe", as opposed to "invalidating the judgement". See: e.g., Muvunyi I, at 148; Nchamihigo, at 354; Kalimanzira, at 100.
[1512] E.g., Stakić, at 136, 173; Hadžihasanović & Kubura, at 131; Krnojelac, at 74.
[1513] E.g., Niyitegeka, at 247-248; Muhimana, at 228; Mugenzi & Mugiraneza, at 55, 62.
[1514] E.g., Rutaganda, at 156; Ntakuritimana & Ntakuritimana, at 121; Nahimana et al., at 215.

were of minor import.[1515] Moreover, the Appeals Chambers have considered whether appellate proceedings have had a remedial effect,[1516] which further suggests that this criterion is exclusively concerned with fatal errors.

However, the Ad Hoc Appeals Chambers have dispensed with this requirement in certain circumstances. In one of its first judgments, the ICTY Appeals Chamber found that "[n]either Party asserts that the Trial Chamber's finding […] had a bearing on the verdict", but, since it concerned "a matter of general significance for the Tribunal's jurisprudence", it considered it appropriate "to set forth its views on this matter".[1517] Subsequently, the ICTR Appeals Chamber provided some indications as to the basis for such a power. It considered such a determination justified "in light of the Appeals Chamber's role in unifying the law".[1518] Further, it referred to the fact that the jurisdiction of the ICTR is "time bound" and that the crimes within its jurisdiction are "particularly serious and their definition given [by] the courts contributes to the overall development of international humanitarian law and international criminal law".[1519] At the same time, it noted that this power "does not seek to create a new power or a possible advisory power" and that, accordingly, the Appeals Chamber has the discretion to consider such issues or to decline to do so.[1520]

9.1.1.2. Error of Fact

In the jurisprudence of the Appeals Chambers of the Ad Hoc Tribunals, allegations of an error of fact based on the trial record and allegations of an error of fact based on additional evidence presented on appeal have raised distinct issues.

9.1.1.2.1. Error of Fact based on the Trial Record

Considering that the record on appeal "shall consist of the trial record",[1521] alleged errors of fact are usually litigated on the basis of the trial record.

[1515] E.g., Nchamihigo, at 32; Kalimanzira, at 21-22.
[1516] E.g., Krstić, at 187; Blaškić, at 282, 298; Simba, at 195; Bagosora & Nsengiyumva, at 543-546.
[1517] Tadić, at 247, 281, 315. Also: e.g., Gacumbitsi, at 147-157; Krnojelac, at 125-145.
[1518] Akayesu, at 21. Also: Krnojelac, at 6.
[1519] Akayesu, at 22. Also: Krnojelac, at 6.
[1520] Akayesu, at 23. Also: Krnojelac, at 6. For examples of the Appeals Chambers' refusal to deal with such matters, see: e.g., Blagojević & Jokić, at 316-318; Kanyarukiga, at 264-268.
[1521] Rule 109 ICTY and ICTR RPE.

9.1.1.2.1.1. Definition

The Ad Hoc Appeals Chambers have exhibited several approaches to such errors of fact, the most important of which concern "plain" errors of fact, a "sufficiency" assessment, and the "only reasonable inference" assessment. The first category constitutes the most straightforward approach to an error of fact and examines whether a factual issue has been correctly or incorrectly appraised. Obvious examples include misrepresentations by a Trial Chamber of documentary evidence[1522] and witness testimony.[1523] As to the second category, in the early stages of its jurisprudence, the ICTY Appeals Chamber has referred to "the issue as to whether the evidence is *factually* sufficient to sustain a conviction"[1524] and it has considered that it "will not call the [Trial Chamber's] findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings".[1525] These statements imply that an error of fact is constituted by a factual finding that does not enjoy sufficient support in the evidence referred to by the Trial Chamber. A typical illustration is reflected in the finding of the ICTY Appeals Chamber that, "[t]here was insufficient evidence to prove beyond a reasonable doubt that" the appellant's conduct constituted either encouragement or moral support for the commission of crimes.[1526] The appellate jurisprudence of the Ad Hoc Tribunals is replete with similarly worded evaluations.[1527] Finally, as concerns the third category, the Appeals Chambers have examined whether no reasonable trier of fact could have concluded that the impugned finding was the only reasonable inference on the evidence before it.[1528]

9.1.1.2.1.2. Standard of Review

In one of its first judgments, the ICTY Appeals Chamber held that "the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached".[1529] This approach entails that "[t]he standard of review to be applied does not require the Appeals Chamber to decide for itself whether or not this evidence is reliable or corroborated".[1530]

[1522] E.g., Bizimungu, at 135.
[1523] E.g., Lukić & Lukić, at 328; Nyiramasuhuko et al., at 3028-3030.
[1524] Delalić et al., at 434 (emphasis in original).
[1525] Krnojelac, at 12. Also: Rutaganda, at 22.
[1526] Brđanin, at 276.
[1527] E.g., Kvočka et al., at 599; Milošević, at 270; Kamahunda, at 65; Nahimana et al., at 513; Muvunyi I, at 81-87; Ndindiliyimana et al., at 346-347; Šainović et al., at 1679.
[1528] E.g., Milošević, at 277; Šainović et al., at 452, 504; Popović et al., at 774.
[1529] Tadić, at 64.
[1530] Kordić & Čerkez, at 291.

Accordingly, the assessment must be made from a detached perspective: "it requires the Appeals Chamber to consider whether no reasonable trier of fact could have come to the" impugned conclusions.[1531] In its early jurisprudence, the ICTY Appeals Chamber appeared to have expanded the standard of appellate review concerning an error of fact. After reiterating the "reasonableness" standard, it considered that it may also overturn a factual finding "where the evaluation of the evidence is *wholly erroneous*".[1532] However, thereafter, the ICTY Appeals Chamber maintained that the standards, in fact, do not differ: "it is clear […] that there is in reality no difference in substance between that test and the unreasonableness one usually stated".[1533] Therefore, although these standards have been used in conjunction on occasion,[1534] the ensuing discussion will be limited to the "reasonableness test".

The ICTY Appeals Chamber has distinguished the "reasonableness test" from two related legal standards. First, it has clarified that the "reasonableness test" exceeds a mere assessment as to whether there was a legal basis for a conviction.[1535] The latter issue is adjudicated at the end of the prosecution case at trial and seeks to determine "whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused".[1536] The reasonableness test has been described as involving "a far wider inquiry than would an inquiry into the legal sufficiency of the evidence", considering that the latter "requires an acceptance of the truthfulness of the witness, whereas the [former] inquiry […] requires a consideration as to whether no reasonable tribunal of fact could have accepted the witness's evidence as either truthful or reliable or both".[1537] Second, it has explained that the "reasonableness test" is distinct from the "only reasonable inference" test applicable to a first instance case based on circumstantial evidence. The latter test entails that, in a case of circumstantial evidence, a finding of guilt "must be the only reasonable conclusion available" and, "[i]f there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted".[1538] In a subsequent case, the ICTY Appeals Chamber has considered that this formulation may appear inconsistent with the "reasonableness" test because the latter

[1531] Ibid., at 291.
[1532] Aleksovski, at 63 (emphasis supplied); Also: Kupreškić et al., at 30, 41; Rutaganda, at. 22.
[1533] Mučić et al. Sentencing Appeal, at 55.
[1534] Blaškić, at 332, 335; Muvunyi II, at 26.
[1535] Delalić et al., at 433-436.
[1536] Ibid., at 434 (emphasis in original). Also: Rule 98*bis* ICTY and ICTR RPE.
[1537] Mučić et al. Sentencing Appeal, at 58.
[1538] Delalić et al., at 458.

"permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial".[1539] However, it has also considered that such a determination is not precluded by the "only reasonable inference" test. It found that this test is "a practical application of the presumption of innocence, but applied only to circumstances where a conclusion of the accused's innocence is what a reasonable trier of fact could have reached".[1540] Beyond these clarifications, the jurisprudence has provided little additional guidance. Indeed, the ICTR Appeals Chamber has acknowledged that this test "is extremely relative" and that, "reasonableness must be assessed on a case-by-case basis in the light of the specific circumstances of the case".[1541]

The Ad Hoc Appeals Chambers have, nevertheless, shed light on auxiliary aspects of the "reasonableness" test. First, the ICTY Appeals Chamber has determined that it is accompanied by the deference principle. Accordingly, "[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber" and, "[t]herefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber".[1542] It subsequently considered that the principle of deference arises out of its disadvantageous position vis-à-vis Trial Chambers: "the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than […] [the Appeals] Chamber to assess the reliability and credibility of the evidence".[1543] Second, the Appeals Chambers have found that the reasonableness standard also entails that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence".[1544] Therefore, "[a] party suggesting only a variation of the findings which the Trial Chamber might have reached […] has little chance of a successful appeal".[1545] In application of these principles, the Appeals Chambers have, for instance, rejected grounds of appeal advancing that different Trial Chambers arrived at diverging outcomes[1546] or asserting that a dissenting trial judge drew opposite conclusions.[1547]

[1539] Kordić & Čerkez, at 288-289.
[1540] Ibid., at 290. Also: Ntagerura et al., at 305.
[1541] Musema, at 204.
[1542] Tadić, at 64.
[1543] Furundžija, at 37.
[1544] Tadić, at 57.
[1545] Krnojelac, at 12.
[1546] E.g., Lukić & Lukić, at 396; Đorđević, at 180.
[1547] E.g., Ntawukulilyayo, at 15.

9.1.1.2.1.3. Practical Application

The appellate review of factual findings has produced diverging results in practice. In this regard, it is indicative that individual judges have found fault with an overly restrictive approach by the Ad Hoc Appeals Chambers,[1548] whilst some of their colleagues have dismissed the Ad Hoc Appeals Chambers' application of the relevant norms as excessively expansive.[1549] A dissenting judge of the ICTY Appeals Chamber has succinctly described this dichotomy within the same judgment. He found that "the selective activism of the [ICTY] Appeals Chamber makes it difficult to grasp the overall rationale of the approach to the facts, deferring sometimes to the Trial Chamber's discretion […] and directly sorting out sometimes the alleged inconsistencies […]".[1550] Even though it is not possible to draw strict boundaries between the types of appellate review engaged in by the Appeals Chambers, these opinions provide clear indications of "narrow" and "broad" appellate review. On this basis, "narrow" appellate review is understood as an augmented degree of deference afforded to Trial Chambers to the detriment of the Appeals Chambers' scope of review concerning matters of facts, whereas "broad" appellate review denotes the opposite tendency.

The exercise of a "narrow" form of appellate review by the Ad Hoc Appeals Chambers primarily arises out of two approaches.

First, the Ad Hoc Appeals Chambers have frequently limited their assessments of matters of fact as to whether or not the Trial Chambers have considered relevant matters. For instance, ruling on a claim that a Trial Chamber had failed to credit certain evidence, the ICTR Appeals Chamber recalled "that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible".[1551] It then dismissed the allegation, considering that "the Trial Chamber expressly considered the testimonies […] and explained its reasons for rejecting them".[1552] Such an assessment resembles the aforementioned determination as to the "the legal sufficiency of the evidence" more than the description of the "reasonableness test".[1553] By reducing its review to a verification as to which sources the Trial Chamber considered, it has exhibited "an acceptance

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[1548] E.g., Muvunyi I, Dissenting Opinion of Judges Liu and Meron, at 7-8.
[1549] E.g., Nchamihigo, Partly Dissenting Opinion of Judge Pocar, at 8; Ntabakuze, Joint Dissenting Opinion of Judges Pocar and Liu, at 2.
[1550] Popović et al., Separate and Dissenting Opinions of Judge Mandiaye Niang, at 11 (footnote 3).
[1551] Ndahimana, at 46.
[1552] Ibid., at 47.
[1553] Part III, Chapter 9.1.1.2.1.2.

of the truthfulness of the witness[es]", which is the distinguishing hallmark of the former test, and omitted to engage in the type of review that sets the "reasonableness test" apart from this test, namely "a consideration as to whether no reasonable tribunal of fact could have accepted the witness's evidence as either truthful or reliable or both".[1554] Similar assessments have appeared throughout the jurisprudence of the Ad Hoc Appeals Chambers.[1555]

Second, the Ad Hoc Appeals Chambers have restricted appellate review to a reiteration of the principle of deference in various situations. This approach has particularly prevailed in respect of assessments concerning witness testimony. For instance, among similar examples,[1556] the ICTR Appeals Chamber has, in respect of an argument that the Trial Chamber unreasonably assessed prosecution witnesses' testimony, restricted its assessment to a conclusion that "[t]he assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a Trial Chamber to which the Appeals Chamber must accord considerable deference".[1557] The Ad Hoc Appeals Chambers have even proceeded in this manner in respect of findings that display indications of error. For instance, the ICTR Appeals Chamber has found that "a reasonable trial chamber could not have reconciled the differences in the testimony of" a witness on the basis of the argumentation put forward by the Trial Chamber.[1558] Even so, this error did not warrant intervention. The Appeals Chamber considered that the Trial Chamber had expressed doubts about the evidence of the witnesses who provided evidence to the contrary, which must be accorded substantial deference as it is "in a unique position to evaluate the demeanour of the testifying witness, to question the witnesses directly about the gaps or inconsistencies in their testimonies, and to evaluate their credibility on the basis of the witnesses' reaction to the difficult questions put to them by the parties or by the judges".[1559] Examples of a comparable nature recur in the jurisprudence.[1560]

In contrast to the "narrow" approach, the "broad" variety of the appellate review exercised by the Ad Hoc Appeals Chambers arises mainly in three manners.

[1554] Part III, Chapter 9.1.1.2.1.2.
[1555] E.g., Aleksovski, at 74; Delalić et al., at 506; Kajelijeli, at 96; Karemera & Ngirumpatse, at 468; Lukić & Lukić, at 283; Popović et al., at 1142.
[1556] E.g., Kajelijeli, at 124; Bagosora & Nsengiyumva, at 262; Kalimanzira, at 176.
[1557] Muvunyi II, at 26.
[1558] Ntakuritimana & Ntakuritimana, at 203.
[1559] Ibid., at 203-204. However, the Appeals Chamber also held that the allegation of an error of fact could not succeed on additional grounds either.
[1560] E.g., ibid., at 244; Ndindiliyimana et al., at 334-346; Ndindabahizi, at 34; Munyakazi, at 154; Niyitegeka, at 126; Popović et al., at 1130-1131.

First, the Ad Hoc Appeals Chambers have limited the effects of the Trial Chambers' opportunity to observe witnesses in several situations, which has been the cornerstone of the principle of deference. In respect of the specific matter of identifications made under difficult circumstances, the ICTY Appeals Chamber found that the ability of the Trial Chamber to observe the witness was not decisive. Following an extensive transcript-based review of the witness' testimony,[1561] it concluded that there were "several strong indications on the trial record that her absolute conviction in her identification evidence was very much a reflection of her personality and not necessarily an indicator of her reliability".[1562] Moreover, even though the ICTY Appeals Chamber had dismissed a similar argument as a request for review *de novo* in the early stages of its jurisprudence,[1563] the Ad Hoc Appeals Chambers have evaluated the quality of particular types of witness evidence relied upon by Trial Chambers. The most important examples concern findings that Trial Chambers have not applied sufficient caution concerning suspicious evidence provided by accomplices[1564] and those that are exclusively underpinned by uncorroborated hearsay evidence.[1565]

Second, the Ad Hoc Appeals Chambers have interfered in the factual assessments of the Trial Chambers on the basis of mere disagreement with the impugned findings on numerous occasions.[1566] As opposed to identifying an error of fact by demonstrating that the finding at issue was one that no reasonable Trial Chamber could have made, the Ad Hoc Appeals Chambers have often recited the relevant findings or evidence and have proceeded to draw the opposite conclusion. For instance, after finding that a Trial Chamber had erred in fact in finding that the transcripts of the testimonies of two witnesses revealed that they were mutually corroborative,[1567] and after acknowledging that it "did not have the opportunity to hear […] and/or to examine" the witnesses,[1568] the ICTR Appeals Chamber concluded, without further elaboration, that "no tribunal of fact could have reached the conclusion […] that the testimonies […] considered *together* established the Appellant's guilt *beyond any*

[1561] Kupreškić et al., at 136, 140-153.
[1562] Ibid., at 154. The reversal was not limited to this error, however. See: ibid., at 155-221, 224.
[1563] Furundžija, at 38, 40.
[1564] E.g., Muvunyi I, at 129-131; Nchamihigo, at 312.
[1565] E.g., Muvunyi I, at 70; Karera, at 204; Kalimanzira, at 79, Ndindabahizi, at 114-115.
[1566] Similar: G. Boas, J. Bischoff, N. Reid, and B. Don Taylor III, *International Criminal Law Practitioner Library: International Criminal Procedure* (Volume 3) (Cambridge: Cambridge University Press, 2011), at 445-446; M. Drumbl and K. Gallant, 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases', 3(2) *The Journal of Appellate Practice and Process* 589 (2001), at 625-627.
[1567] Rutaganda, at 496, 500.
[1568] Ibid., at 505 (emphasis supplied).

reasonable doubt".[1569] Similar assessments are commonplace in the jurisprudence.[1570] Moreover, the Ad Hoc Appeals Chambers have also overruled Trial Chambers on the basis of the "only reasonable inference" approach to errors of fact. Such assessments strongly evoke a subjective appraisal of the evidence by the Appeals Chambers themselves, as opposed to a mere assessment as to the existence of an error of fact. For instance, the ICTR Appeals Chamber has found that, although "[t]here is no doubt […] that the […] factual findings [of the Trial Chamber] are compatible with the existence of 'a joint agenda' aiming at committing genocide", "it is not the only reasonable inference".[1571] The breadth of such assessments is made clear by the proponents of a narrow approach in respect of such issues. For instance, a dissenting judge of the ICTY Appeals Chamber claimed that "[a]ppellate jurisdiction is not to be exercised to determine whether the appellate court agrees with a finding of fact made by the trial court, except in the sense of determining whether there was evidence on which a reasonable trier of fact could make that finding" and, "[i]f there was such evidence before the Trial Chamber, in the absence of a clear error of reasoning, it is immaterial that the Appeals Chamber, if it were the Trial Chamber, would have made a different finding of fact".[1572] This approach has been applied frequently in the jurisprudence.[1573]

Finally, the Ad Hoc Appeals Chambers have directly resolved contentious issues of fact on appeal. Thus, despite their professed limitations as to factual issues, they have made findings of fact in respect of matters not fully explored at first instance. For instance, the ICTR Appeals Chamber concluded that, although a Trial Chamber had not found that certain crimes had been committed at locations supervised by an appellant, "such a finding was implicit and it could reasonably be based on the testimony of" a witness.[1574] A dissenting judge noted that this finding exemplified that the Appeals Chamber "acted as a fact-finder in the first instance and substituted its own findings in order to cure the errors".[1575] In another example, the ICTY

[1569] Ibid., at 506 (emphases in original).
[1570] E.g., Krnojelac, at 166-171, 176-180, 184-188, 189-207; Hadžihasanović & Kubura, at 198-232; Muvunyi I, at 81-87; Karera, at 203-204; Bagosora & Nsengiyumva, at 279-283, 312-315, 321-323, 356-362, 375-376; Ndindiliyimana et al., at 346-351; Karemera & Ngirumpatse, at 649-651; Nzabonimana, at 451-453; Nyiramasuhuko et al., at 3028-3030; Lukić & Lukić, at 320-321, 324, 328, 329, 331; Šainović et al., at 451-452, 504; Popović et al., at 773-774; Nahimana et al., at 510, 519, 593-600.
[1571] Nahimana et al., at 910.
[1572] Ibid., Partly Dissenting Opinion of Judge Shahabuddeen, at 63.
[1573] E.g., Milošević, at 277; Mrkšić & Šljivančanin, at 61-62, 103; Šainović et al., at 452, 453, 504, 520; Popović et al., at 774-775; Bagosora & Nsengiyumva, at 283, 303; Nizeyimana, at 151-159, 274-276; Mugenzi & Mugiraneza, at 88-91, 94, 136-142; Bizimungu, at 138-139, 174, 251-253.
[1574] Nahimana et al., at 663.
[1575] Ibid., Partly Dissenting Opinion of Judge Meron, at 1.

Appeals Chamber drew a critical inference establishing an accused's *mens rea* in respect of certain criminal events.[1576] However, this particular fact had not been subject to litigation at trial and, accordingly, the Trial Chamber had dismissed it as "conjecture".[1577]

9.1.1.2.2. Error of Fact based on Additional Evidence

The reference to an error of fact in the appellate provisions of the Ad Hoc Tribunals does not, on an ordinary reading, encompass an error of fact based on additional evidence. In the words of the ICTY Appeals Chamber, "it is difficult to see how the Trial Chamber may be said to have committed an error of fact where the basis of the error lies in additional evidence which, through no fault of the Trial Chamber, was not presented to it".[1578] It has, nevertheless, found that "by construing the reference to 'an error of fact' as meaning objectively an incorrectness of fact disclosed by relevant material, whether or not erroneously excluded by the Trial Chamber, that additional material may be admitted".[1579] In a subsequent case, the ICTY Appeals Chamber highlighted the "danger of a miscarriage of justice when a Trial Chamber is deprived of crucial evidence relating to the guilt or innocence of an accused that does not surface until the trial is completed".[1580] Accordingly, it held that where "a party is successful in locating additional evidence demonstrating that a Trial Chamber's finding of guilt is erroneous, it will fall within the Appeals Chamber's jurisdiction to hear an appeal on the ground of 'an error of fact that has occasioned a miscarriage of justice'".[1581]

9.1.1.2.2.1. Admission of Additional Evidence

The record on appeal may be supplemented through the admission of additional evidence. In general, a restrictive stance towards additional evidence has been adopted. As held by the ICTY Appeals Chamber, "[…] additional evidence should not be admitted lightly at the appellate stage",[1582] since "[t]he appeal process […] is not designed for the purpose of

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[1576] Mrkšić & Šljivančanin, at 62.
[1577] Ibid., at 61.
[1578] Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, *Prosecutor v. Tadić*, Case No. IT-94-1-A, ICTY, Appeals Chamber, 15 October 1998, at 37.
[1579] Ibid., at 38.
[1580] Kupreškić et al., at 44.
[1581] Ibid., at 44.
[1582] Tadić, at 16, referring to: Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, *Prosecutor v. Tadić*, Case No. IT-94-1-A, ICTY, Appeals Chamber, 15 October 1998.

allowing parties to remedy their own failings or oversights during trial or sentencing".[1583] Two principal avenues exist for the admission of such evidence.

Rule 115(A) of the Ad Hoc RPE specifically lays down that "[a] party may apply by motion to present additional evidence before the Appeals Chamber" and that "[r]ebuttal material may be presented by any party affected by the motion".[1584] The Rule's neutral wording implies that both the person convicted or acquitted at first instance and the prosecutor may seek the admission of additional evidence on appeal. The latter may even do so on behalf of a convicted person.[1585] Three criteria apply to such applications. First, "the applicant must […] demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence".[1586] Second, the evidence must be "both relevant to a material issue and credible".[1587] Third, "the evidence must be such that […] it could show that the verdict was unsafe", which is satisfied if "there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted".[1588] The first criterion may, however, be departed from, if "the exclusion of the additional evidence would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict",[1589] which is a heightened threshold in comparison with the aforementioned "could" standard.

In addition, an alternative legal basis has been employed for the admission of additional evidence, pursuant to the stipulation in Rule 107 of the Ad Hoc RPE that "[t]he rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber[s]".[1590] On this basis, the Ad Hoc Appeals Chambers have invoked analogous prerogatives of the Trial Chambers to: (i) "to admit any

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[1583] Erdemović, at 15.
[1584] This Rule further stipulates the following formal requirements: "[…] [s]uch motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. […] Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material". Also: ICTY, *Practice Direction on Formal Requirements for Appeals from Judgement*, No. IT/201, 7 March 2002, at 11.
[1585] Naletilić & Martinović, Annex 1: Procedural Background, at 26.
[1586] Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, *Prosecutor v. Popović et al.,* Case No. IT-05-88-A, ICTY, Appeals Chamber, 20 October 2011, at 7.
[1587] Ibid., at 8.
[1588] Ibid., at 9.
[1589] Ibid., at 10 (emphasis in original).
[1590] Rule 107 ICTY RPE and ICTR RPE.

relevant evidence which it deems to have probative value";[1591] (ii) "to *proprio motu* order either party to produce additional evidence" and "to summon witnesses and order their attendance";[1592] or (iii) "to *proprio motu* […] issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of […] the trial".[1593] This approach may circumvent the strict conditions of Rule 115. For instance, the ICTR Appeals Chamber has denied an accused's request to call a witness "pursuant to Rule 115 […], but decided to summon […] [him] pursuant to Rules 98 and 107" ICTR RPE itself.[1594]

As held by the ICTY Appeals Chamber, additional evidence "may not have been subjected to any form of adversarial scrutiny, save for the Appeals Chamber's initial assessment as to whether it was, on its face, credible".[1595] In this regard, the Ad Hoc RPE stipulate that an additional evidence motion may be decided "with or without an oral hearing".[1596] The decision to conduct an evidentiary hearing concerning additional evidence on appeal is often contingent on challenges raised by the opposing party.[1597] However, as the aforementioned wording indicates, this remains a discretionary decision and the Ad Hoc Appeals Chambers have, accordingly, also dispensed with such hearings.[1598] Using the aforementioned prerogatives of the Trial Chambers pursuant to Rule 107 RPE, the Ad Hoc Appeals Chambers have, on occasion, expanded the reach of such hearings. For instance, acting *proprio motu*, they have summoned witnesses to assess their statements,[1599] admitted rebuttal material,[1600] and ordered further testing of additional evidence by means of an expert report[1601] and additional investigations by the prosecutor.[1602] Besides testing additional evidence autonomously, the Ad Hoc Appeals Chambers have also considered that they may "order the

[1591] Rule 89(C) ICTY and ICTR RPE. E.g., Kupreškić et al., at 55-57, referring to decisions of the ICTY Appeals Chamber in the Furundžija and Delalić et al. cases in the accompanying footnotes.
[1592] Rule 98 ICTY and ICTR RPE. E.g., Krstić, at 92; Bagosora & Nsengiyumva, at 531.
[1593] Rule 54 ICTY and ICTR RPE. E.g., Nahimana et al., at 454.
[1594] E.g., Bagosora & Nsengiyumva, at 531. Also: M. Drumbl and K. Gallant, 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases', 3(2) *The Journal of Appellate Practice and Process* 589 (2001), at 630.
[1595] Kupreškić et al., at 70. This statement was provided in the context of Rule 115 of the RPE, but it equally applies to the admission of evidence on appeal pursuant to various prerogatives of the Trial Chambers in conjunction with Rule 107 of the RPE.
[1596] Rule 115(C) ICTY and ICTR RPE. Additional evidence may be tested during the appellate hearing provided for in Rule 114 of the ICTY and ICTR RPE or during a separate hearing (e.g., Kupreškić et al., Annex A: Procedural Background, at 505; Krajišnik, Annex A: Procedural Background, at 48).
[1597] E.g., Kupreškić et al., Annex A: Procedural Background, at 505.
[1598] E.g., ibid., at 70.
[1599] E.g., Blaškić, Annex A: Procedural Background, at 41; Musema, Annex A - Proceedings on Appeal, at 4; Kvočka et al., Annex A: Procedural Background, at 746; Nahimana et al., at 447.
[1600] Nahimana et al., at 448.
[1601] Ibid., at 454.
[1602] Kamuhanda, Annex A - Procedural Background, at 442.

case to be remitted to a Trial Chamber".[1603] Limited guidance has, however, been provided as to this possibility. For instance, after ordering the parties to submit arguments as to whether the admission of voluminous additional evidence justified a retrial, the ICTY Appeals Chamber has simply concluded that "a re-trial was not warranted".[1604]

9.1.1.2.2.2. Definition

The Ad Hoc Appeals Chambers have, much like the approach to errors of fact based on the trial record, primarily assessed whether the additional evidence discloses "plain" errors of fact or whether it affects a "sufficiency" assessment. With regard to the first category, the Appeals Chambers have mainly sought to determine whether additional evidence materially invalidates facts accepted by Trial Chambers.[1605] In respect of the second category, the Appeals Chambers have examined whether the additional evidence has altered the balance of the evidence supporting a factual finding reached at first instance. On this basis, "sufficient" evidence could be rendered "insufficient" or *vice versa*.[1606]

9.1.1.2.2.3. Standard of Review

The availability of additional evidence on appeal must necessarily alter the Appeals Chambers' standard of review. As explained by a judge of the ICTR Appeals Chamber, whereas "the reasonable conclusion criterion applies where all the evidence has in fact been assessed by the trial court and where the conclusion reached by the trial court on that evidence is known", "[i]n the case of additional evidence, the evidence in question was never before the trial court and the latter never came to a conclusion on it […]".[1607] Accordingly, the salient issue is whether the Appeals Chambers should continue to apply a deferential standard of review - i.e. whether the conclusion was one that *no reasonable trier of fact* could have adopted when taking account of the additional evidence – or whether they should resort to an autonomous review standard - i.e. whether they should *themselves* be convinced of the existence of an error of fact in light of the additional evidence presented on appeal.

[1603] Kupreškić et al., at 70. Also: Rutaganda, at 473 (footnote 837).
[1604] Blaškić, at 6. Similar: Rutaganda, at 473 (footnote 837).
[1605] For instance, it has been found that, contrary to the impugned findings of fact established at first instance, individual appellants did not: (i) hold a certain position (Kupreškić et al., at 274); (ii) exercise exclusive control over explosives (Blaškić, at 454); or (iii) commit a specific criminal act (Musema, at 193).
[1606] For instance, it has been found that additional evidence: (i) did not "have any impact on the Trial Chamber's findings" that an appellant participated in a beating (Kvočka et al., at 496, 554); (ii) was not "sufficient to undermine the extensive evidence supporting the Trial Chamber's findings" as to an appellant's hierarchical position (Krajišnik, at 351); and (iii) did "not undermine the credibility" of witnesses establishing an appellant's criminal responsibility (Nyiramasuhuko et al., at 1368, 3117. Similar: Nahimana et al., at 466).
[1607] Musema, Declaration Judge Shahabuddeen, at 27.

Initially, the ICTY Appeals Chamber "decided against importing tests from domestic jurisdictions"[1608] and determined that, in relation to appellate proceedings dealing with additional evidence, the "reasonableness" test must be upheld with appropriate modifications. Accordingly, it defined the applicable test as: "has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted […]".[1609] In this respect, the Appeals Chamber noted that it "has been guided by Rule 117(A) which provides that '[t]he Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it'".[1610]

A remarkable shift occurred thereafter. In a subsequent case, the ICTY Appeals Chamber considered that its previous judgment "did not determine whether it was satisfied itself, beyond reasonable doubt, as to the conclusion reached, and indeed, it did not need to do so, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt".[1611] On this basis, it developed a new standard of appellate review: "[…] when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and in some instances in light of a newly articulated legal standard, it should, in the interests of justice, be convinced *itself*, beyond reasonable doubt, as to the guilt of the accused […]".[1612] It reasoned that, "if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt".[1613] A two-stage analysis has resulted from these considerations. The Ad Hoc Appeals Chambers "will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could

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[1608] Kupreškić et al., at 73-75.
[1609] Ibid., at 75. This standard was also accepted by the ICTR Appeals Chamber. See: Musema, at 185-186; Rutaganda, at. 473.
[1610] Kupreškić et al., at 75.
[1611] Blaškić, at 22. Also: Kvočka et al., at footnote 993. This is, however, an unconvincing argument. The Kupreškić Appeals Chamber had defined a deferential standard of review in general terms and, in this respect, it did not leave room for autonomous consideration. The outcome it had reached was fully in line with this formulation. Accordingly, there was no basis for the Kupreškić Appeals Chamber to consider, in addition, whether it was itself convinced of the relevant finding beyond reasonable doubt on the basis of the additional evidence.
[1612] Blaškić, at 23 (emphasis supplied).
[1613] Ibid., at 23.

have reached the conclusion of guilt beyond reasonable doubt".[1614] The second part of the test applies "[i]f […] the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt" and, if this is the case, it "will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt".[1615]

9.1.1.2.2.4. Practical Application

The aforementioned shift regarding the standard of review concerning alleged errors of fact based on additional evidence has also met with opposition from dissenting judges, who have argued in favour of the retention of the initial standard.[1616] It is, therefore, not surprising that the practical application of the standard of appellate review has oscillated.

Both Ad Hoc Appeals Chambers have applied a deferential standard akin to the initial standard after the adoption of the autonomous standard. For instance, the ICTY Appeals Chamber determined that, "based on the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings, […] *no reasonable trier of fact* could have concluded that" an appellant's subordinate held a certain position.[1617]

9.1.1.2.3. Miscarriage of Justice

Regardless of the preceding distinction, besides demonstrating an error of fact, as such, an appellant must establish that such an error gives rise to a "miscarriage of justice".[1618] The Ad Hoc Appeals Chambers have defined a "miscarriage of justice" as a "grossly unfair outcome in judicial proceedings".[1619] Such an outcome arises, in general, where a Trial Chamber fails to "discharge its obligation by not deducing all the legal implications from the evidence

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[1614] Ibid., at 24(c)(i). The ICTY Appeals Chamber made this finding in the context of an appeal against conviction based on additional evidence. There is no reason to conclude, however, that the same test would not be applicable, *mutatis mutandis,* in an appeal against acquittal based on additional evidence.
[1615] Ibid., at 24(c)(ii). Also: Ndindabahizi, at 68.
[1616] Blaškić, Partial Dissenting Opinion of Judge Weinberg De Roca (also: Kordić & Čerkez, Separate Opinion of Judge Weinberg de Roca; Kvočka et al., Separate Opinion of Judge Weinberg De Roca); Kvočka et al., Separate Opinion of Judge Shahabuddeen.
[1617] Naletilić & Martinović, at 167 (emphasis supplied). Similar: Nahimana et al., at 466.
[1618] Furundžija, at 37. This criterion entails a modification of the appellate process in respect of prosecutorial appeals alleging an error of fact vis-à-vis defence appeals based on such errors. Whereas "[a]n accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt", the prosecution "must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated". See: Bagilishema, at 13.
[1619] Furundžija, at 37.

presented".[1620] In more specific terms, a miscarriage of justice typically manifests itself "when a defendant is convicted despite a lack of evidence on an essential element of the crime".[1621] With respect to an erroneous acquittal, a miscarriage of justice results from the failure to identify "all of the requisite legal implications of the evidence".[1622] Conversely, the most obvious example of the absence of a miscarriage of justice is where, despite an error in the assessment of a piece of evidence, other evidence continues to support the impugned finding,[1623] whether or not additional evidence has been presented.[1624]

9.1.2. Appeal from Sentence

Although the Statutes of the Ad Hoc Tribunals do not specifically contemplate appeals from the Trial Chambers' sentencing decisions, the appellate provisions are sufficiently generally worded to accommodate such appeals. Indeed, the Ad Hoc Appeals Chambers have entertained appeals that do not concern the merits of a trial judgment, but seek an adjustment of the sentence imposed at first instance. Such appeals typically concern requests for appellate review of the sentencing procedure following a guilty plea[1625] and specific grounds of appeal alleging that, irrespective of errors of law or fact allegedly committed on the merits, the Trial Chamber erroneously exercised its sentencing discretion.[1626]

9.1.2.1. Standard of Review

Similar to appeals from the merits of trial judgments, the Ad Hoc Appeals Chambers have determined that appeals from the sentence imposed by a Trial Chamber do not entail *de novo* review.[1627] They have, accordingly, adopted a deferential attitude to Trial Chambers' assessments as to sentencing.[1628] In its first sentencing appeal, the ICTY Appeals Chamber

[1620] Rutaganda, at 580.
[1621] Furundžija, at 37.
[1622] Krnojelac, at 172.
[1623] E.g., Nyiramasuhuko et al., at 3097.
[1624] E.g., ibid., at 3110.
[1625] E.g., Serushago Sentencing Appeal, at 2-3; Kambanda Sentencing Appeal, at 2-3; D. Nikolić Sentencing Appeal, at 3-5; Babić Sentencing Appeal, at 3-4; Deronjić Sentencing Appeal, at 3-5; Jokić Sentencing Appeal, at 3-5; M. Nikolić Sentencing Appeal, at 3-5; Bralo Sentencing Appeal, at 3-5; Zelenović Sentencing Appeal, at 4-6.
[1626] E.g., Galić, at 438; Gacumbitsi, at 109; Muvunyi II, at 64.
[1627] E.g., Babić Sentencing Appeal, at 6-7; Vasiljević, at 9; M. Nikolić Sentencing Appeal, at 7-8; Jokić Sentencing Appeal, at 7-8. Limited exceptions have been made in this regard. See: Kupreškić et al., at 463-464.
[1628] The deferential approach is further underscored by the refusal of the Appeals Chambers to lay down sentencing guidelines for Trial Chambers. See: Furundžija, at 238; Delalić et al., at 715-718.

noted that "there is no discernible error […] that would permit the Appeals Chamber to substitute its own decision for that of the Trial Chamber".[1629]

It provided more guidance as to its approach subsequently. Referring to four national jurisdictions, it considered that "[a]ppellate review of sentencing […] in the major legal systems […] is usually exercised sparingly" and that it "followed this general practice" on the basis of the "discernible error" standard.[1630] The ICTR Appeals Chamber provided more detail as to the discernible error standard thereafter. It held that a discretionary sentencing decision may be disturbed on appeal only where "the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have […]".[1631] Whereas this statement has been provided in relation to the appellate review regarding the weight attached to mitigating circumstances, the ICTY Appeals Chamber has applied this approach to sentencing assessments in general.[1632] The latter thereafter reformulated these grounds and added two additional ones. It considered that it has to be demonstrated "that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly".[1633] Moreover, the early emphasis placed by the ICTY Appeals Chamber on an erroneous "exercise of discretion" has been expanded by the ICTR Appeals Chamber. It considered that it may also disturb a Trial Chamber's sentencing decision if it "has failed to follow applicable law".[1634]

However, sentencing errors need not necessarily give rise to an adjustment of the sentence. The Ad Hoc Appeals Chambers have most often found that such errors have not had any

[1629] Tadić Sentencing Appeal, at 22 (emphasis supplied).
[1630] Aleksovski, at 186-187.
[1631] Serushago Sentencing Appeal, at 23. Also: Delalić et al., at 780.
[1632] D. Nikolić Sentencing Appeal, at 9.
[1633] Babić Sentencing Appeal, at 44. Also: M. Nikolić Sentencing Appeal, at 95; Galić, at 394.
[1634] Serushago Sentencing Appeal, at 23. Also: Akayesu, at 408. The ICTY Appeals Chamber has adopted this aspect too. See: Delalić et al., at 725.

material effect on the totality of the criminal conduct of the appellant.[1635] A lack of effect on the sentence has also been found with regard to a range of specific considerations.[1636]

9.1.2.2. Practical Application

Comparable to appellate review of errors of fact,[1637] the appellate review of sentencing decisions may be separated into two variants in practice. In this regard, "narrow" appellate review, characterised by an augmented degree of deference to Trial Chambers' sentencing decisions to the detriment of the Appeals Chambers' powers to exercise appellate review, and "broad" appellate review, revealing an increased willingness to intervene in sentencing decisions pursuant to a decreased degree of deference, are distinguishable.

Two main forms of "narrow" appellate review of sentencing decisions have been applied. First, such review has, on occasion, been reduced to a mere verification of the factors considered by the Trial Chamber. Among other examples,[1638] the ICTR Appeals Chamber has found that, "[a]s the Trial Chamber clearly *considered* […] an aggravating factor in some detail", it was not satisfied that it has been established that it "gave *insufficient weight*" to it.[1639] Second, appellate review of sentencing decisions has also been effectively omitted on the basis of the principle of deference. In this regard, the Appeals Chambers have frequently confined their review to unadorned confirmations that Trial Chambers' assessments of sentencing factors or the sentence itself fall within their discretionary frameworks.[1640]

"Broad" appellate review is mainly reflected in the Appeals Chambers' interference with Trial Chambers' sentencing determinations on the basis of mere disagreement with the sentence imposed. For instance, the ICTY Appeals Chamber has increased a sentence of twenty years' imprisonment to a sentence of life imprisonment, on the basis that, "[a]lthough the Trial

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[1635] E.g., Jelisić, at 94; Kunarac et al., at 362; Babić Sentencing Appeal, at 59-60; Rutaganda, at 592; Niyitegeka, at 269; Ntakirutimana & Ntakirutimana, at 570; Kamuhanda, at 363; Naletilić & Martinović, at 619, 632; Šainović et al., at 1844; Popović et al., at 2115-2116; Tolimir, at 648.
[1636] E.g., the fact that an appellant had already been incarcerated when he surrendered voluntarily (Kvočka et al., at 713), the probability that a mitigating factor would have been accorded limited weight on the basis of other findings of the Trial Chamber (Naletilić & Martinović, at 606), the lack of clarity as to how much weight a Trial Chamber had assigned to a particular issue (Kalimanzira, at 229), and the provision of insufficient evidence to the ICTY Appeals Chamber (Krnojelac, at 260).
[1637] Part III, Chapter 9.1.1.2.
[1638] E.g., Muvunyi II, at 67-68; Ndindiliyimana et al., at 440, 442; Karemera & Ngirumpatse, at 698.
[1639] Bikindi, at 190 (emphases supplied).
[1640] E.g., Tadić Sentencing Appeal, at 20; Kambanda Sentencing Appeal, at 126; Limaj et al., at 132; Kayishema & Ruzindana, at 370; Nahimana et al., at 1106.

Chamber did not err in its factual findings and correctly noted the principles governing sentencing, it committed an error in finding that the sentence imposed adequately reflects the level of gravity of the crimes committed […] and […] [the accused's] degree of participation".[1641] Thus, on the basis of the findings of the Trial Chamber, it concluded that the sentence "was so unreasonable and plainly unjust, in that it underestimated the gravity of […] [the accused's] criminal conduct, that it is able to infer that the Trial Chamber failed to exercise its discretion properly". [1642] A dissenting judge indicated that elements of disagreement lay at the basis of the aggravation of sentence. He noted that "the majority simply offers conclusory statements". [1643] Indeed, other jurisprudential references have confirmed this interpretation. In a related case, the ICTY Appeals Chamber dismissed an identical argument, setting forth that "[m]erely reciting the Trial Chamber's findings on the gravity of the offence does not suffice to show that the Trial Chamber erred in the exercise of its discretion".[1644] Other appellate judgments reflect rejections of similar arguments.[1645]

9.2. ICC

9.2.1. Appeal from Conviction or Acquittal

Compared to the Ad Hoc Tribunals' Statutes, the ICC Statute has expanded the grounds of appeal pertaining to decisions of conviction or acquittal. Whereas the former provide for two grounds of appeal equally applicable to the convicted person and the prosecutors, the ICC Statute sets forth three common grounds of appeal (i.e. procedural error, error of fact, and error of law[1646]) and bestows an additional ground of appeal on the convicted person (i.e. "[a]ny other ground that affects the fairness or reliability of the proceedings or decision"[1647]). Even though, as with the Ad Hoc Tribunals' Statutes,[1648] questions have arisen as to the distinction between them, these grounds will be assessed individually.[1649]

[1641] Galić, at 455.
[1642] Ibid., at 455. Similar, e.g., Gacumbitsi, at 204; Mrkšić & Šljivančanin, at 413; Nyiramasuhuko et al., at 3424.
[1643] Galić, Separate and Partially Dissenting Opinion of Judge Meron, at 13.
[1644] Milošević, at 323.
[1645] E.g., Kordić & Čerkez, at 1063-1065; Ndindiliyimana et al., at 442.
[1646] Art. 81(1)(a)(i)-(iii), 81(1)(b)(i)-(iii) ICC Statute.
[1647] Art. 81(1)(b)(iv) ICC Statute.
[1648] Part III, Chapter 9.1.1.
[1649] Whereas further issues may crystallise as the jurisprudence of the ICC Appeals Chamber matures, its early jurisprudence and/or the wording of the ICC Statute reveal the following two matters of concern. First, with regard to the distinction between errors of fact and law, the ICC Appeals Chamber has prioritised the former over the latter, in line with the approach of the Ad Hoc Tribunals' Appeals Chambers. It has explicitly considered that, even though an appellant had alleged errors of law, the arguments in question had to "be assessed against the standard of review for alleged factual errors since […] the Appeals Chamber is required to

As to the general character of the appellate process of the ICC, the ICC Appeals Chamber has, based on the Ad Hoc Tribunals' jurisprudence, considered that "[…] 'an appeal is not a trial *de novo*' […]".[1650] Rather, the ICC's appellate "proceedings are of a corrective nature, which finds expression in, *inter alia*, the standard of review on appeal".[1651] Accordingly, it has also imported certain attendant corollaries of this characterisation of its appellate proceedings, namely the exclusion of an unfettered right to adduce additional evidence on appeal[1652] and the limited body of evidence to be considered[1653].

However, this is not an obvious conclusion. Prior to the ICC Appeals Chamber's holding, commentators had noted, as to the question whether an appeal at the ICC is "intended to be a 'hearing *de novo*' or […] a corrective procedure", that "[t]he [Rome] Statute is not entirely clear on this point, although the specified grounds of appeal would suggest it is more in the nature of the latter".[1654] Various elements of the appellate structure of the ICC indeed leave room for a broader conception. The ICC Statute mandates the ICC Appeals Chamber to

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review the Trial Chamber's factual findings" (e.g., Ngudjolo, at 44, 129). It has also applied this approach in a more implicit manner, by, for instance, adjudicating both alleged errors of law (e.g., Lubanga, at 177-178) and arguments concerning the standard of proof (e.g., Lubanga, at 110-118) against the "reasonableness" standard. However, the ICC Appeals Chamber has also blurred the distinction between these categories by adjudicating grounds of appeal in a general manner and without clarifying the exact category or standard of review at stake (e.g., Lubanga, at 205-209). Second, in respect of "[a]ny other ground that affects the fairness or reliability of the proceedings or decision", it has been noted that it "may add little to the other specified grounds of appeal", as the "apparent intention was to include a 'catch-all' provision", but "it is likely that any valid grounds of appeal would fall within one of the other categories" (see: C. Staker and F. Eckelmans, 'Article 81', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1915 (München: Verlag C.H. Beck, 2016), at 1941. Similar: P. De Cesari, 'Observations on the Appeal before the International Criminal Court', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: a Challenge to Impunity* 225 (Aldershot: Ashgate, 2001), at 228). The early jurisprudence of the ICC Appeals Chamber seems to confirm this position. In this regard, the ICC Appeals Chamber has not drawn a specific distinction between this ground and the other grounds of appeal. For instance, it has held that an appellant had failed to establish a fair trial violation (Lubanga, at 136, 171) or the erroneousness of a finding (Lubanga, at 153) and that it could not find an "error" on the part of the Trial Chamber, without further specification as to the type of error at issue (Lubanga, at 163, 175). It has also referred to the "reasonableness" standard on one occasion (Lubanga, at 178), which applies to an error of fact. However, a more detailed discussion of these matters is beyond the scope of this research.

[1650] Lubanga, at 26-27 (emphasis in original).

[1651] Ibid., at 56.

[1652] Ibid., at 75.

[1653] Ibid., at 26.

[1654] H. Brady and M. Jennings, 'Appeal and Revision', in R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* 294 (The Hague: Kluwer Law International, 1999), at 585 (emphasis in original). Similar: R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 473. Contra: C. Staker and F. Eckelmans, 'Article 81', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1915 (München: Verlag C.H. Beck, 2016), at 1922-1923.

proprio motu broaden an appeal[1655] and to call evidence itself to determine a factual issue.[1656] Moreover, the ICC Appeals Chamber's entitlement to resort to the Trial Chambers powers provides a particularly broad basis to investigate and examine an impugned decision's factual aspects.[1657] In this context, it may, most pertinently, adopt "such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings",[1658] "[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States",[1659] "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties",[1660] request "the submission of all evidence that it considers necessary for the determination of the truth",[1661] and "rule on the relevance or admissibility of any evidence".[1662]

9.2.1.1. Procedural Error

According to the ICC Appeals Chamber, procedural errors occur, in general, "in the proceedings leading up to an impugned decision" and they "may be based on events which occurred during the trial proceedings and pre-trial proceedings".[1663] In more specific terms, under this category, the ICC Appeals Chamber has reviewed a Trial Chamber's refusal to: permit access to certain reports;[1664] to use particular documents in cross-examination,[1665] and to allow a witness to be questioned in a certain manner.[1666]

Decisions adopted by a Trial Chamber during trial and pre-trial proceedings will often have been subject to scrutiny by the ICC Appeals Chamber - or, at least, may have been proposed for such scrutiny[1667] - through the interlocutory appeal procedure foreseen by the ICC Statute.[1668] The question, therefore, arises whether the appellant is barred from arguing the same issue in connection with an appeal from a decision of conviction or acquittal, pursuant to the *res judicata* doctrine. In this respect, the ICC Appeals Chamber has determined that no

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[1655] Art. 81(2)(b)-(c) ICC Statute.
[1656] Art. 83(2) ICC Statute.
[1657] Art. 81 ICC Statute; Rule 149 ICC RPE.
[1658] Art. 64(3)(a) ICC Statute.
[1659] Art. 64(6)(b) ICC Statute.
[1660] Art. 64(6)(d) ICC Statute.
[1661] Art. 69(3) ICC Statute.
[1662] Art. 69(4) ICC Statute.
[1663] Lubanga, at 20; Ngudjolo, at 21.
[1664] Ngudjolo, at 259-270.
[1665] Ibid., at 271-276.
[1666] Ibid., at 277-283.
[1667] Leave to appeal may be denied for such requests on the basis of Art. 82(1)(d) ICC Statute.
[1668] Art. 82 ICC Statute.

such impediment exists. After noting that "the impugned decision itself will only rarely contain procedural errors" and that "it is likely that any procedural errors are committed in the proceedings leading up to a decision" of conviction or acquittal, it has concluded that "it must be possible to raise procedural errors on appeal", since "to decide otherwise would […] deprive the parties of the ability to raise procedural errors on appeal".[1669]

The ICC Appeals Chamber has determined that "procedural errors often relate to alleged errors in a Trial Chamber's exercise of its discretion".[1670] It has, thus, introduced the standard of review it had developed in respect of discretionary decisions in its jurisprudence on appeal against other decisions adopted by Trial Chambers.[1671] In this regard, it has held that "'[t]he Appeals Chamber will not interfere with the […] Trial Chamber's exercise of discretion […] merely because the Appeals Chamber, if it had the power, might have made a different ruling'".[1672] Accordingly, it "will not interfere with the […] Trial Chamber's exercise of discretion […], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error […]'".[1673] This entails that appellate interference is only justified: "'(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion'".[1674]

9.2.1.2. Error of Fact

As with the Ad Hoc Tribunals, an allegation of an error of fact in the appellate procedure of the ICC may be based on either the trial record or additional evidence.

9.2.1.2.1. Error of Fact based on the Trial Record

In comparison with the Ad Hoc Tribunals, the ICC Appeals Chamber has more explicitly defined an error of fact. It has held that "it will not interfere with factual findings of the first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account

[1669] Ngudjolo, at 247.
[1670] Ibid., at 21.
[1671] Art. 82(1) ICC Statute.
[1672] Ngudjolo, at 21.
[1673] Ibid., at 21.
[1674] Ngudjolo, at 21, referring to: Lubanga Sentencing Appeal, at 41.

relevant facts".[1675] As this enumeration appears to be exhaustive, it may be seen as a more narrow construction of an error of fact vis-à-vis the Ad Hoc Tribunals.[1676] On the other hand, the specific illustrations, and in particular the reference to the misappreciation of the facts, may be considered wide enough to accommodate the Ad Hoc Tribunals' definitions too.

The ICC Appeals Chamber has considered that, "[h]aving regard to the similarity between the […] [ICC's] legal framework and those under which the ad hoc tribunals operate, the Appeals Chamber considers it appropriate to apply the same standard" of "reasonableness" in reviewing a Trial Chamber's factual findings.[1677] It has further imported the corollaries of this standard, namely the primacy of the Trial Chamber in resolving inconsistencies in witness testimonies, the deference owed to the Trial Chamber in light of its advantages in assessing the credibility and reliability of evidence, and the need for a case-by-case assessment regarding the alleged erroneousness of a factual evaluation.[1678]

As concerns the practical application of the standard of review relating to alleged errors of fact, the early jurisprudence of the ICC Appeals Chamber mainly reveals characteristics associated with "narrow" appellate review.[1679] Most importantly, the ICC Appeals Chamber's review of alleged errors of fact has been reduced to an assessment as to the factors considered by a Trial Chamber. For instance, in respect of an argument that a "purportedly erroneous finding stems from the Trial Chamber's reliance on the 'inaccurate statements of [a] Witness […]' and its dismissal of direct evidence presented by" other witnesses,[1680] the Appeals Chamber has held that the appellant had failed "to identify an error" in respect of the first part of this argument[1681] and that "the Trial Chamber took full account of the conflicting testimony of a number of witnesses".[1682] Its reasoning, thus, addresses which considerations the Trial Chamber set forth, but it does not reflect whether, in terms of substance, the statements of the witness relied on by the Trial Chamber were or were not inaccurate and whether this evidence was affected by the other evidence pointed out by the appellant. Similar examples appear in

[1675] Ibid., at 21.
[1676] Part III, Chapter 9.1.1.2.1.2.
[1677] Lubanga, at 27. See: Part III, Chapter 9.1.1.2.1.2.
[1678] Lubanga, at 23-25.
[1679] Part III, Chapter 9.1.1.2.1.3.
[1680] Lubanga, at 476.
[1681] Ibid., at 480.
[1682] Ibid., at 481-482.

the early jurisprudence of the ICC Appeals Chamber.[1683] The prevalence of "narrow" appellate review is further confirmed by pleas for a broader scope of review by a dissenting judge of the ICC Appeals Chamber. *De novo* review of particular evidentiary material has been proposed,[1684] on the basis that, "in cases where the appellant has adequately substantiated his or her arguments, the Appeals Chamber must assess the evidence at hand compared to the factual findings of the Trial Chamber, in order to decide whether these findings were reasonable or not, and to give effect to the important safeguards that the right of appeal is intended to provide".[1685]

9.2.1.2.2. Error of Fact based on Additional Evidence

The legal regime of the ICC does not specifically set forth the criteria applicable to the admissibility of additional evidence on appeal.[1686] The ICC Statute provides that "the [ICC] Appeals Chamber shall have all the powers of the Trial Chamber"[1687] and, in connection therewith, that it "may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue".[1688] On this basis, the ICC Appeals Chamber disposes of far-reaching prerogatives. Most pertinently, it may invoke the powers of the Trial Chamber to "[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States";[1689] "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial";[1690] and request "the submission of all evidence that it considers necessary for the determination of the truth".[1691]

Despite the ostensible flexibility inherent in the legal framework, the ICC Appeals Chamber has adopted a rather conservative approach to additional evidence, inspired by the Ad Hoc Tribunals. In this regard, it has considered that, although the Ad Hoc Tribunals'

[1683] Ibid., at 235, 245-248, 350-352, 428-432; Ngudjolo, at 150-153, 191-192, 204, 219.
[1684] Lubanga, Dissenting Opinion of Judge Anita Ušacka, at 50.
[1685] Ibid., at 51.
[1686] E.g., L. Carter, 'The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal', in G. Venturini and S. Bariatti (eds.), *Liber Fausto Pocar: Individual Rights and International Justice* 125 (Milano: Giuffre Editore, 2009), at 129; H. Brady and M. Jennings, 'Appeal and Revision', in R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* 294 (The Hague: Kluwer Law International, 1999), at 585-586.
[1687] Art. 83(1) ICC Statute. Also: Rule 149 ICC RPE.
[1688] Art. 83(2) ICC Statute.
[1689] Art. 64(6)(b) ICC Statute.
[1690] Art. 64(6)(d) ICC Statute.
[1691] Art. 69(3) ICC Statute.

"jurisprudence may be of assistance, the Court's legal texts provide for the criteria that are applicable with regard to the admissibility of evidence on appeal".[1692] But, after developing these criteria, it has concluded that they "are in many respects similar to those applied by […] the *ad hoc* tribunals".[1693] As to the specific criteria, it has found that "the [trial] criteria of relevance,[1694] probative value and potential prejudicial effect [to a fair trial or to a fair evaluation of the testimony of a witness] also apply to the admission of evidence at the appellate stage of proceedings", as "it would be of no use to admit evidence into the record that is irrelevant, devoid of probative value or potentially prejudicial".[1695] It went on to consider that this is not an exhaustive list and that, therefore, other criteria "can be taken into account, especially given the distinct features of the appellate stage of proceedings".[1696] Noting that ICC appellate proceedings "are of a corrective nature"[1697] and that the evaluation of the evidence "is the primary responsibility of the relevant Trial Chamber"[1698], it has found that "allowing the admission of additional evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced".[1699] Accordingly, it has concluded that it "will generally not admit additional evidence on appeal unless there are convincing reasons why such evidence was not presented at trial, including whether there was a lack of due diligence".[1700] This criterion is, in fact, contained in the ICC Regulations of the Court, which provide that "[a] participant seeking to present additional evidence shall file an application setting out: (a) [t]he evidence to be presented; [and] (b) [t]he ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber".[1701] Especially illustrative of its restrictive approach, the ICC Appeals Chamber has found that, although the ICC Regulations of the Court do not do so, "it is necessary to introduce the criterion that it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part", as it "derives from the principle that evidence should,

[1692] Lubanga, at 53.
[1693] Ibid., at 63.
[1694] Ibid., at 74, 93.
[1695] Ibid., at 54 (footnote supplied).
[1696] Ibid., at 55.
[1697] Ibid., at 56.
[1698] Ibid., at 57.
[1699] Ibid., at 57.
[1700] Ibid., at 58. See: e.g., ibid, at 75-79, 92.
[1701] Regulation 62(1) ICC Regulations.

as far as possible, be presented before the Trial Chamber".[1702] Despite these limitations, the ICC Appeals Chamber has also introduced a residual power. Thus, it has found that "it is within its discretion to admit additional evidence on appeal despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so".[1703]

However, the early appellate jurisprudence of the ICC Appeals Chamber also discloses a divergence with the approach of the Ad Hoc Tribunals. Whereas the Ad Hoc Tribunals decide, in general, upon the admissibility of additional evidence prior to hearing such evidence,[1704] the ICC Appeals Chamber may proceed in the reverse order. According to the ICC Regulations of the Court, the ICC Appeals Chamber may "[d]ecide to first rule on the admissibility of the additional evidence, in which case it shall direct the participant affected by the application […] to address the issue of admissibility of the evidence in his or her response, and to adduce any evidence in response only after a decision on the admissibility of that evidence has been issued by the Appeals Chamber; or […] "[d]ecide to rule on the admissibility of the additional evidence jointly with the other issues raised in the appeal, in which case it shall direct the participant affected by the application […] to both file a response setting out arguments on that application and to adduce any evidence in response".[1705] However, the latter sequence may be cumbersome. As noted by the ICC prosecutor, it could entail that a response would have to be filed to arguments "that are based on evidence that is not part of the record, while arguing, at the same time, that the evidence is inadmissible".[1706] The ICC Appeals Chamber found, however, that this approach does not "exclude […] the making of interlocutory decisions in relation to the proposed additional evidence".[1707]

Additional evidence may be heard at the appellate hearing.[1708] In this regard, the ICC Appeals Chamber has adopted "procedures similar to those used during the trial proceedings",[1709] in respect of which it has determined the Parties' rights to communicate with the witnesses prior

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[1702] Lubanga, at 59. See: e.g., ibid, at 104, 113.
[1703] Ibid., at 62.
[1704] Part III, Chapter 9.1.1.2.1. However, the ICTY Appeals Chamber has also considered such a course of action. See: Kupreškić et al., at 71.
[1705] Regulation 62(2) ICC Regulations.
[1706] Directions under Regulation 62 of the Regulations of the Court, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 21 December 2012, at 3.
[1707] Ibid., at 8. Also: Lubanga, at 80.
[1708] Scheduling Order for a Hearing before the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 21 March 2014, at 1(a).
[1709] Scheduling Order and Decision in Relation to the Conduct of the Hearing before the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 30 April 2014, at 17.

to their testimony,[1710] the order and time-frame of the questioning of the witnesses,[1711] the procedure for the notification of the materials used during the questioning of the witnesses,[1712] and the conduct and scope of the Parties' questioning of the witnesses.[1713]

However, having rejected requests for the admission of additional evidence on appeal in its early jurisprudence,[1714] the ICC Appeals Chamber has not explicitly set forth the standard of review applicable to alleged errors of fact based on additional evidence.

9.2.1.3. Error of Law

In respect of appeals from decisions of acquittal or conviction, the ICC Appeals Chamber has not set out what an error of law entails in general. However, based on the standard of review, as set forth below, such errors must be taken to concern, first and foremost, Trial Chambers' "'interpretation of the law'".[1715] This understanding corresponds with the approach of the early jurisprudence of the ICC Appeals Chamber. It has, for instance, reviewed Trial Chambers' interpretation of elements of crimes,[1716] modes of liability,[1717] the possibility of treating separate crimes together,[1718] the standard of proof,[1719] and the definition of evidence.[1720] However, an error of law does not encapsulate two closely associated matters, namely procedural issues and fair trial rights,[1721] as they may be appealed separately.

In a manner similar to the Ad Hoc Tribunals' Appeals Chambers,[1722] the ICC Appeals Chamber has determined that it reviews matters of law *de novo.* Thus, it "will not defer to the Trial Chamber's interpretation of the law", but "it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law".[1723]

[1710] Ibid., at 2(b), 19.
[1711] Ibid., at 2(c), 24.
[1712] Ibid., at 2(d), 20-23.
[1713] Ibid., at 2(e).
[1714] Lubanga, at 65-113.
[1715] Ibid., at 18.
[1716] Ibid., at 283-303, 322-340.
[1717] Ibid., at 441-473.
[1718] Ibid., at 307-313.
[1719] Ngudjolo, at 93, 123-125.
[1720] Ibid., at 217.
[1721] Part III, Chapter 9.2.1.1; Part III, Chapter 9.2.1.4.
[1722] Part III, Chapter 9.1.1.1.
[1723] Lubanga, at 18; Ngudjolo, at 20.

9.2.1.4. Any other Ground

Commentators have suggested that this ground differs from "procedural errors, as it "should be substantive", which would entail that it would cover various fair trial issues and the conduct of the trial on the basis of "grounds originally unconnected with it, e.g., an armed conflict or uprising in the city where the Court is located, or a threat to the safety of the audience or participants".[1724] The ICC Appeals Chamber has addressed this matter in a rather hesitant manner. With respect to allegations of violations of fair trial rights, it has held that, "[i]n keeping with articles 81 (1) (b) (iv) […] of the [Rome] Statute, these allegations are considered […] in relation to whether his rights have been violated […]".[1725] In addition, as is apparent from the dearth of analysis concerning this ground of appeal, the ICC Appeals Chamber has not defined a specific standard of review.

9.2.1.5. Affected Reliability or Materially Affected

In addition to establishing one of the aforementioned categories, an appellant must establish that, in respect of "[a]ny other ground that affects the fairness or reliability of the proceedings or decision", "that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence" and, in respect of procedural error, error of fact, or error of law, "that the decision or sentence appealed from was materially affected".[1726]

Whereas the ICC Appeals Chamber has not provided a specific definition of the former criterion,[1727] it has addressed the latter in more detail. In this regard, it has found that it has to be demonstrated that, "in the absence of the […] error, the judgment would have substantially differed from the one rendered".[1728] It has further clarified that "this standard is high – it must be demonstrated that, had the Trial Chamber not erred […], the decision […] *would* (as opposed to "could" or "might") have been *substantially* different".[1729]

As discussed, the Ad Hoc Appeals Chambers have found that they may dispense with the corresponding "invalidation" criterion regarding errors of law and discuss matters of general

[1724] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1544-1545.
[1725] Lubanga, at 28.
[1726] Arts. 81(1), 83(2) ICC Statute.
[1727] Lubanga, at 28.
[1728] Ibid., at 20; Ngudjolo, at 21.
[1729] Ngudjolo, at 285 (emphasis in original).

significance for the jurisprudence.[1730] It has been noted that the justification of the Ad Hoc Tribunals, i.e. their ad hoc and temporary nature, "doesn't apply to the" ICC and, therefore, that the latter "is likely to confine itself to the terms of article 83" of its Statute.[1731] The more detailed nature of the ICC Statute and the fact that the verdicts of the ICC Appeals Chamber do not bind other chambers[1732] further render such an expansive approach as to errors of law improbable. Even though the ICC Appeals Chamber has not expressly set forth its views in respect of this issue, signals from its early jurisprudence confirm these assessments. It has, for instance, "decided not to consider a question of law", since a "determination [by a Trial Chamber] has not been challenged on appeal by any of the parties".[1733]

9.2.2. Appeal from Sentence

In contradistinction to the Ad Hoc Tribunals' Statutes' general language,[1734] the ICC Statute explicitly sets forth that both decisions of conviction and acquittal, on the one hand, and the sentence, on the other hand, may be appealed.[1735] A particular ground of appeal may be invoked in respect of an appeal from a sentence, i.e. "disproportion between the crime and the sentence".[1736] The ICC Appeals Chamber has confirmed that a decision on sentence is only appealable on this basis.[1737] It has further stated that "[p]roportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator and, in this regard, relates to the determination of the length of sentence".[1738]

The designation of a single ground of appeal could be seen to narrow the jurisdiction of the ICC Appeals Chamber in relation to such appeals. Interpreted narrowly, the review of the proportionality of the sentence vis-à-vis the crime need not encompass the facets of appellate review associated with decisions of conviction or acquittal, such as the interpretation of the law or the assessment of factual elements. However, such effects seem to have been largely

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[1730] Part III, Chapter 9.1.1.1.
[1731] W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 954-955. A dissenting judge has found that "it is necessary for the Appeals Chamber to address this issue *proprio motu*". Lubanga, Partly Dissenting Opinion of Judge Sang-Hyun Song, at 1 (emphasis in original).
[1732] According to Art. 21(2) ICC Statute, "[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions" (emphasis supplied).
[1733] Lubanga, at 37-38.
[1734] Part III, Chapter 9.1.2.
[1735] Art. 81 ICC Statute.
[1736] Art. 81(2)(a) ICC Statute.
[1737] Lubanga Sentencing Appeal, at 40.
[1738] Ibid., at 40.

avoided in the early jurisprudence of the ICC Appeals Chamber. In this regard, it has held that "[t]he drafting history reveals that delegates considered including the qualifiers of 'significantly' or 'manifestly disproportionate', but ultimately rejected them".[1739] Furthermore, it has considered that "arguments which challenge findings in the Conviction Decision that are raised for the first time" on appeal will be considered on a case-by-case basis and will not, therefore, be dismissed *in limine.*[1740]

Aligning itself with the Ad Hoc Tribunals,[1741] the ICC Appeals Chamber has adopted a deferential approach to appeals against a sentence imposed by a Trial Chamber. In this regard, it has held that its "primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person" and "not to determine, on its own, which sentence is appropriate".[1742] This language amounts to a rejection of an appeal *de novo* in respect of sentencing too. It has further clarified that, in the context of sentencing, "the weight given to an individual [sentencing] factor and the balancing of all relevant [sentencing] factors is at the core of a Trial Chamber's exercise of discretion".[1743] Accordingly, it has imported the corresponding standard for appellate review employed by the Ad Hoc Tribunals.[1744]

The early jurisprudence of the ICC mainly reveals a "narrow" approach to sentencing appeals in practice.[1745] The primary illustration of such an approach is the provision of reasoning that offers conclusory statements without revealing an analysis of the arguments' merits.[1746]

9.3. Evaluation

9.3.1. Conviction and Sentence

Despite the variations in the relevant provisions, the output of the human rights monitoring bodies and courts contains a common core in respect of the scope of appellate review pertaining to the conviction and the sentence. It entails that both the conviction and sentence

[1739] Ibid., at 40.
[1740] Ibid., at 50.
[1741] Ibid., at 46.
[1742] Ibid., at 39.
[1743] Ibid., at 43.
[1744] Ibid., at 44. See: Part III, Chapter 9.1.2.1.
[1745] Part III, Chapter 9.1.2.1.
[1746] E.g., Lubanga Sentencing Appeal, at 73, 93, 111.

must be reviewed on appeal, but that appellate review may be limited to sentencing on account of the nature of the procedure or the behaviour of the person concerned.[1747]

The appellate procedures of the Ad Hoc Tribunals and the ICC clearly comply with this norm. The jurisprudence of the former has established that the language of the Statutes of the Ad Hoc Tribunals encompasses appeals from sentences, whereas the ICC Statute expressly contemplates appellate review as to both components of first instance proceedings. Moreover, the Ad Hoc Appeals Chambers have only confined their appellate review to matters of sentencing on admissible grounds, namely as a result of plea agreements[1748] and the ICC Appeals Chamber may be expected to follow an identical approach.[1749]

9.3.2. Facts and Law

Since the Appeals Chambers of the Ad Hoc Tribunals and ICC have been empowered to determine matters of guilt or innocence,[1750] they must, as a matter of international human rights law,[1751] assess factual issues of a determinative nature. The scope of appellate review provided by the Ad Hoc and ICC Appeals Chambers is in accordance with this norm.[1752] Whereas the "wide" type of appellate review provided by the Ad Hoc Appeals Chambers clearly envisages the assessment of factual matters, arguments based on factual considerations have not been excluded under the "narrow" type of appellate review exercised by both the Ad Hoc and ICC Appeals Chambers either, without entering into a trial *de novo.*[1753]

Even though the human rights monitoring bodies and courts have not specifically determined the scope of appellate review required in respect of appellate proceedings based on additional evidence, the approach of the Appeals Chambers of the Ad Hoc Tribunals and the ICC does not, as such, conflict with human rights norms. These types of appellate proceedings explicitly broaden the factual scope of appellate proceedings and, thus, fall in line with the aforementioned need to provide for appellate review of matters of law and fact. Moreover, as

[1747] Part II, Chapter 5.1.4.7.1; Part II, Chapter 6.1.
[1748] Part III, Chapter 4.1; Part III, Chapter 9.1.2.
[1749] Part III, Chapter 4.1; Part III, Chapter 9.2.2.
[1750] Part III, Chapter 10.
[1751] Part II, Chapter 5.1.4.7.2; Part II, Chapter 6.2.3.
[1752] In light of the conclusion that the practical application of the requirements concerning the form of written submissions by the Ad Hoc Tribunals is not reconcilable with the need to ensure a reasonable degree of clarity/foreseeability in the regulation of appellate proceedings, it is not possible to consider whether the scope of review afforded to arguments dismissed summarily is in accordance with standards of international human rights law. This inconsistency precludes such an assessment. See: Part III, Chapter 7.2.5.
[1753] Part III, Chapter 9.1.1.2.1.3; Part III, Chapter 9.2.1.2.1.

discussed, the scope of appellate review must encompass both conviction and sentence, but may be confined to sentencing on account of the nature of the procedure or the behaviour of the person concerned.[1754] This would entail, *a contrario*, that the scope of appellate review may also be broadened on appeal on account of a request by the convicted person, such as in the case of a motion to present additional evidence on appeal.

9.3.3. Regulation of Scope of Appellate Review

In addition to the aforementioned components, the scope of appellate review also engages the general discretion to regulate the appellate process. The combination of various legal traditions in the procedural systems of the Ad Hoc Tribunals and the ICC implies a particular choice for the type of appellate review.[1755] Thus, the scope of appellate review of the Appeals Chambers of the Ad Hoc Tribunals and the ICC must comply with the outer limits of the discretion to regulate the appellate process recognised in international human rights law, namely the preservation of the core of the right to appeal and the conservation of a reasonable degree of clarity/foreseeability and accessibility.[1756]

Commencing with the latter aspect, whereas the ICC Appeals Chamber has more consistently applied a "narrow" form of appellate review regarding alleged errors of fact based on the trial record and sentencing appeals,[1757] the scope of appellate review provided by the Ad Hoc Tribunals has swung back and forth between a "narrow" and "broad" variety of appellate review in relation to these matters.[1758] The Ad Hoc Appeals Chambers have not been able to formulate a clear and consistent approach in this regard. Indeed, individual judges have exhibited their divisions in separate and dissenting opinions.[1759] Accordingly, the type of appellate review applied in such situations has been unclear or unforeseeable to an unreasonable degree. Therefore, in this respect, the Ad Hoc Appeals Chambers have exceeded the discretion afforded by international human rights law to regulate the appellate process. Whereas the Ad Hoc Tribunals have inconsistently applied the standard for appellate review concerning errors of fact based on additional evidence too,[1760] the uncertainty affecting the practical application of this variation of the appellate review of the Ad Hoc Tribunals has

[1754] Part II, Chapter 5.1.4.7.1.
[1755] Part I, Chapter 5.1.6; Part III, Chapter 1.
[1756] Part II, Chapter 5.1.3.1; Part II, Chapter 6.1; Part III, Chapter 3.
[1757] Part III, Chapter 9.2.1.2.1; Part III, Chapter 9.2.2.
[1758] Part III, Chapter 9.1.1.2.1.3; Part III, Chapter 9.1.2.2.
[1759] Ibid.
[1760] Part III, Chapter 9.1.1.2.2.3; Part III, Chapter 9.1.1.2.2.4.

been confined to a relatively limited number of cases.[1761] In addition, the ICTY Appeals Chamber has provided reasoning as to its initial reorientation towards an autonomous scope of appellate review regarding such errors.[1762] Therefore, although regrettable, these inconsistencies are not of such a nature to warrant the conclusion that this facet of the scope of appellate review is unclear or unforeseeable to an *unreasonable* degree.

Turning to the former issue, although the ICC Appeals Chamber has not been in a position to address this matter in its early jurisprudence, the Ad Hoc Appeals Chamber have decided, in principle, to apply an autonomous standard of review in respect of alleged errors of facts based on additional evidence, so as to ensure that "a conclusion of guilt based on the totality of evidence relied upon in the case" is, at least, achieved on appeal.[1763] This standard appears to confer a first instance role onto the Ad Hoc Appeals Chambers, which would render an appeal from such a conviction impossible in the context of a two-tier legal process. The exercise of the discretion to regulate the appellate process by the Ad Hoc Appeals Chambers could, therefore, be seen to annul the right to appeal in such situations.[1764] Even so, such a final appellate assessment does not adjust the appellate process to such an extent to warrant the conclusion that the right to appeal has been fully cancelled out. As discussed, appellate review of sufficient scope remains encapsulated by this type of appellate scrutiny.[1765] Furthermore, it is critical that, when additional evidence is adduced by the prosecutor, the accused is entitled to address the admissibility of such evidence and its impact on the impugned findings.[1766] It, therefore, allows the defendant to exercise his rights on appeal. Accordingly, the approach of the Ad Hoc Appeals Chambers remains within the confines set by international human rights law.

10. Powers of Ad Hoc and ICC Appeals Chambers

10.1. Ad Hoc Tribunals

The Ad Hoc Tribunals' legal texts contain two sets of provisions relevant to the Appeals Chambers' powers. First, the Ad Hoc Statutes set forth that the Appeals Chambers "may

[1761] Ibid.
[1762] Ibid.
[1763] Blaškić, at 23.
[1764] Part II, Chapter 5.1.3.1.
[1765] Part III, Chapter 9.3.2.
[1766] Part III, Chapter 9.1.1.2.2.1.

affirm, reverse or revise the decisions taken by the Trial Chamber".[1767] These powers will be discussed in respect of both appeals from the trial judgment's merits or the sentence imposed, as the case may be. Second, the Ad Hoc RPE stipulate that "[i]n appropriate circumstances the Appeals Chamber[s] may order that the accused be retried according to law".[1768] Furthermore, the Appeals Chambers have expressly invoked their inherent powers as supplementary to the powers conferred on them by their Statutes and RPE. Finally, the application of the powers of the Ad Hoc Appeals Chambers in respect of prosecutorial appeals will be described separately, considering the particular nature of such appeals.

10.1.1. Affirm, Reverse, or Revise

10.1.1.1. Affirm

The power to "affirm" logically entails a lack of appellate intervention in respect of first instance proceedings. Affirmations mainly result from the fact that, in practice, the Ad Hoc Appeals Chambers dismiss the vast majority of grounds of appeal on substantive grounds. Trial judgments or first instance sentences may also be affirmed where a Trial Chamber has erred. If the threshold for appellate intervention has not been met (i.e. if an error of law has not invalidated the impugned judgment, an error of fact has not occasioned a miscarriage of justice, or a sentencing error has not had material effect on the sentence imposed at first instance), the Ad Hoc Appeals Chambers need not correct an error.

10.1.1.2. Reverse

The plain meaning of the verb "to reverse" is "to make (something) the opposite of what it was".[1769] It, therefore, mainly pertains to the conversion of a first instance conviction into an acquittal on appeal or *vice versa* in the context of judicial proceedings.

Such an interpretation also entails that this power is inherently incompatible with the nature of an appeal from a sentence imposed by a Trial Chamber. Considering that sentencing appeals in the context of a conviction do not pertain to the innocence of the person concerned,[1770] a conviction pronounced at first instance may not be reversed into an acquittal on this basis.

[1767] Art. 25(2) ICTY Statute; Art. 24(2) ICTR Statute.
[1768] E.g., Jelisić, at 73, 77; Krajišnik, at 799.
[1769] C. Soanes and A. Stevenson (eds.), *Oxford Dictionary of English* (Oxford: Oxford University Press, 2006).
[1770] Furundžija, at 253; Kayishema & Ruzindana, at 369.

This is further confirmed by the Appeals Chambers' discussion of their power to "revise" in various appeals from sentencing decisions and the concomitant absence of references to the power to "reverse".[1771] In addition, this issue does not arise in the context of an acquittal, as no sentence will have been imposed and, therefore, such an appeal necessarily concerns the merits of the trial judgment. Therefore, the ensuing discussion is restricted to the power to "reverse" in the context of appeals from the merits of a trial judgment.

10.1.1.2.1. Errors of Law

In respect of errors of law, the Appeals Chambers have explicitly found that they may determine the ramifications of such errors themselves. After proceeding first as a matter of course,[1772] the ICTY Appeals Chamber overtly established its powers in this respect. It has considered that, where an error of law arises, "it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly".[1773] In addition, it has held that, "[i]n doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record […] and must determine whether it is itself convinced beyond reasonable doubt as to the factual finding".[1774] Further, the ICTY Appeals Chamber has clarified that a supplementary step is involved where additional evidence has been presented on appeal. If it is itself convinced beyond reasonable doubt as to the finding of guilt[1775] following the application of the aforementioned test, it will "determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself still convinced beyond reasonable doubt as to the finding of guilt" as a second step.[1776]

These powers have been employed in a wide-ranging manner by the Ad Hoc Appeals Chambers. For instance, errors of law concerning Trial Chambers' definitions of crimes and

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[1771] E.g., D. Nikolić Sentencing Appeal, at 9; Babić Sentencing Appeal, at 7; Deronjić Sentencing Appeal, at 8.
[1772] For instance, after famously finding that a test of "overall control" should be applied in the determination of the international or non-international armed character of an armed conflict, rather than the "effective control" test developed by the ICJ, it continued to hold that it "must now apply its foregoing analysis to the facts and draw the necessary legal conclusions therefrom". See: Tadić, at 80-145, 149. Similar: Tadić, at 185-228, 230-232; Krnojelac, at 97, 105-113.
[1773] Blaškić, at 15. Also: Nahimana et al., at 13.
[1774] Blaškić, at 15, 24(b), 24(d)(i). Also: Nahimana et al., at 13.
[1775] The ICTY Appeals Chamber has made this finding in the context of an appeal against conviction based on additional evidence. There is no reason to conclude, however, that the same test would not be applicable, *mutatis mutandis,* in an appeal against acquittal based on additional evidence, in light of the equal rights of appeal afforded to the prosecutor and defendant.
[1776] Blaškić, at 24(d)(ii).

modes of liability have resulted in conclusive determinations on the guilt or innocence of the person concerned on multiple occasions.[1777] Errors of law arising out of Trial Chambers' failure to provide a reasoned opinion have proven to be a particularly effective vehicle in this regard. For example, the jurisprudence of the ICTY indicates that such an error could lead to a broader role for the Appeals Chamber than foreseen in the Statute. After finding that a Trial Chamber had failed "to discuss all constituent elements of all crimes charged […]", it has noted that it had been forced "to reassess a plethora of evidence in order to find out whether or not all constituent elements of the crimes were established during trial, *instead of being in a position […] of focussing on the mere legal and factual issues of the case*".[1778] The Appeals Chambers' *de novo* review of witnesses' credibility or reliability pursuant to such an error, in spite of the deference traditionally owed to Trial Chambers in this respect, constitutes a further manifestation of the wide-ranging effects of the power to reverse.[1779]

However, the practical application of the powers of the Ad Hoc Appeals Chambers in connection with errors of law has revealed considerable ambiguity in various respects.

First, it has remained unclear whether the Ad Hoc Appeals Chambers apply an autonomous or deferential standard of review upon concluding that an error of law has been committed by a Trial Chamber. The aforementioned reference to "itself" in the general description of the standard of review pertaining to errors of law clearly points to an autonomous review standard, according to which the Appeals Chambers would have to determine the matter from their own perspective. This test has, indeed, been applied on a number of occasions.[1780] The ICTY Appeals Chamber has even explicitly referred to the need to assess relevant evidence *de novo* in certain cases.[1781] However, several judges of the Appeals Chambers have dissented from cases in which *de novo* review has been applied after finding an error of law.[1782] Considering

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[1777] Martić, at 313-320; Kalimanzira, at 160-165; Perišić, at 43-74.
[1778] Kordić & Čerkez, at 387 (emphasis supplied). Similar: Nahimana et al., at 477; Nzabonimana, at 383-384; Stanišić & Simatović, at 80; Ndindiliyimana et al., at 56, 293, 316. However, the ICTR Appeals Chamber has also considered that "[t]he absence of discussion reconciling the apparently contradictory evidence of" witnesses warranted, as such, the quashing of a conviction. A review of the evidentiary record was, thus, not carried out by the ICTR Appeals Chamber in this situation. See: Nchamihigo, at 345-355.
[1779] E.g., Bizimungu, at 64; Kalimanzira, at 99-100; Lukić & Lukić, at 62; Haradinaj et al., at 134, 147, 154, 226, 254.
[1780] E.g., Hadžihasanović & Kubura, at 266; Nahimana et al., at 736, 754; Kalimanzira, at 160, 200-201; Seromba, at 161, 185; Strugar, at 297-308; Đorđević, at 863-869, 876-901, 919-927.
[1781] E.g., Perišić, at 45, 70-71, 96; Gotovina & Markač, at 110.
[1782] E.g., Stakić, Partly Dissenting Opinion of Judge Shahabuddeen, at 2-7; Seromba, Dissenting Opinion of Judge Liu, at 11-12; Kalimanzira, Partially Dissenting and Separate Opinions of Judge Pocar, at 4-5.

this chasm, it is not surprising that the Appeals Chambers have also frequently applied a detached perspective, i.e., after concluding that an error of law had been committed, they have asked whether the impugned finding was one that no reasonable trier of fact could have reached.[1783] In addition, the ICTY Appeals Chamber has explicitly rejected *de novo* review in a particular case. It has found that, "given the factually complex circumstances of this case, an appellate assessment […] would require the Appeals Chamber to re-evaluate the entire trial record", but that it "cannot be expected to act as a primary trier of fact".[1784]

Second, the scope of the evidence to be considered by the Appeals Chambers in such situations has been subject to divergent interpretations. In this regard, the reference to "evidence contained in the trial record" has given rise to opposing tendencies. Conflicting interpretations of the "trial record" lie at the heart of this matter. As mentioned, the Appeals Chambers have found that, in light of the absence of *de novo* review, only evidence relied on by Trial Chambers or referred to by the Parties will be taken into account.[1785] However, a literal interpretation of the relevant Rules, which stipulate that "the record on appeal shall consist of the trial record",[1786] does not impose such limitations and would, therefore, allow the Appeals Chambers to peruse the entire trial record on their own motion.[1787] In light of these matters, the approaches of the Appeals Chambers have varied. In certain instances, the Appeals Chambers have limited their review to an assessment of certain findings adopted by Trial Chambers, without considering the underlying evidence. For instance, as found by a dissenting member of the ICTY Appeals Chamber, the majority had not considered "the *evidence in the trial record* to determine whether the conclusion of the Trial Chamber is still valid, but limits its assessment to the *Trial Chamber's analysis and findings*".[1788] This was illustrated by the fact that the Appeals Chamber had relied on the Trial Chamber's dismissal of a relevant body of evidence as "not wholly conclusive when considered alone",[1789] without considering whether the underlying evidence supported this finding. On the other hand, the Appeals Chambers have adopted a significantly broader approach, by considering evidence

[1783] E.g., Nchamihigo, at 283-286; Ntabakuze, at 171, 174; Blaškić, at 543, 557; Popović et al., at 1417, 1428; Ndindiliyimana et al., at 56-61, 71-75; Krnojelac, at 97-113.
[1784] Orić, at 185-186.
[1785] Part III, Chapter 9.1.1.
[1786] Rule 109 ICTY and ICTR RPE.
[1787] Blaškić, Partial Dissenting Opinion of Judge Weinberg De Roca, at 11; Kordić & Čerkez, Separate Opinion of Judge Weinberg De Roca, at 5.
[1788] Gotovina & Markač, Dissenting Opinion of Judge Fausto Pocar, at 12 (emphases in original). Also: Gotovina & Markač, Dissenting Opinion of Judge Carmel Agius, at 3, 12-14.
[1789] Gotovina & Markač, at 66.

that had not been invoked by Trial Chambers. For instance, the ICTR Appeals Chamber has reviewed "the Trial Chamber's factual conclusions and the evidence contained in the trial record" with the understanding that "the law should be applied to the factual findings of the Trial Chamber, taken as a whole".[1790] In this regard, a dissenting judge noted that "the Majority's factual conclusions are not all based on findings of fact that have been made by the Trial Chamber", but that it "consistently supplements the Trial Chamber's findings with the testimony of witnesses simply because the 'Trial Chamber found them to be credible'".[1791]

10.1.1.2.2. Errors of Fact

In contradistinction to errors of law, the Appeals Chambers have been more reticent in the formulation of their powers to reverse trial judgments based on errors of fact in the absence of additional evidence presented on appeal. Whereas the ICTY Appeals Chamber has stated that it may "substitute its own finding for that of the Trial Chamber",[1792] it has not explicitly determined that it may apply its findings to the trial record. However, the jurisprudence leaves no doubt that, in effect, the Appeals Chambers have conclusively settled issues upon finding an error of fact. For instance, as a result of determinations that no reasonable trier of fact could have concluded that the impugned finding was the only reasonable inference on the evidence before the Trial Chamber, the Ad Hoc Appeals Chambers have often quashed findings and pronounced convictions or acquittals.[1793]

The description of the Appeals Chambers' powers in respect of errors of fact based on additional evidence on appeal was initially marked by a similar reticence. With regard to the need for adversarial scrutiny of the additional evidence, the ICTY Appeals Chamber held that it can "either […] test the evidence itself to determine veracity, or order the case to be remitted to a Trial Chamber […] to hear the new evidence".[1794] The latter option would imply that the primary fact-finding role of the Trial Chambers would be sustained and that the Appeals Chambers would retain their limited role in respect of factual issues. However, the aforementioned statement of the ICTY Appeals Chamber that it "should […] be convinced

[1790] Seromba, at 161-162.
[1791] Seromba, Dissenting Opinion of Judge Liu, at 11. Also: Lukić & Lukić, Dissenting Opinion of Judge Morrison, at 29.
[1792] Kupreškić et al., at 30.
[1793] E.g., Milošević, at 277; Mrkšić & Šljivančanin, at 61-62, 103; Šainović et al., at 452, 453, 504, 520; Popović et al., at 774-775; Bagosora & Nsengiyumva, at 283, 303; Nizeyimana, at 151-159, 274-276; Mugenzi & Mugiraneza, at 88-91, 94, 136-142; Bizimungu, at 138-139, 174, 251- 253.
[1794] Kupreškić et al., at 70. Also: Part III, Chapter 9.1.1.2.2.1.

itself, beyond reasonable doubt, as to the guilt of the accused […]", so as to prevent that "neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt", clearly establishes a power to conclusively determine issues of fact based on additional evidence on appeal.[1795] Accordingly, on the basis of additional evidence, considered either in isolation or in combination with other factors, the Appeals Chambers have frequently proceeded to substitute convictions for acquittals.[1796]

10.1.1.3. Revise

In general terms, as noted by the ICTY Appeals Chamber, "[o]ne meaning of the term revise is 'to alter (an opinion, judgement, etc.) after reconsideration, or in the light of further evidence'".[1797] As such, an overlap with the term "reverse" arises. The conversion of convictions into acquittals and *vice versa*, encapsulated by the term "reverse", is, at the same time, an extreme form of alteration, which falls under the term "revise". However, a contextual reading reveals that the terms necessarily differ in scope. As the conversion of convictions into acquittals and *vice versa* is specifically expressed by the term "reverse", the term "revise" must relate to alterations of a trial judgment that fall short thereof.

This power has mainly been employed by the Ad Hoc Appeals Chambers to maintain (part of) a trial judgment on a different legal basis. In this regard, the Appeals Chambers have considered, for instance, whether the reversal of a conviction for a particular crime may be replaced with a conviction for a different crime.[1798] More frequently, however, the Appeals Chambers have considered whether a conviction may be sustained on the basis of an alternate mode of liability, despite an error in respect of the form of liability underlying the initial conviction.[1799] Initially, the Appeals Chambers proceeded in this manner without specifically detailing their powers to do so. Subsequently, in a relatively advanced stage of its appellate jurisprudence, the ICTY Appeals Chamber explicitly addressed this matter.[1800] In this regard, it held that, in light of the aforementioned literal meaning of its power to "revise" a trial judgment, "[t]he practice of sustaining a conviction pursuant to an alternate mode of liability

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[1795] Blaškić, at 23.
[1796] E.g., Kupreškić et al., at 304; Blaškić, at 455, 494, 511; Musema, at 194.
[1797] Gotovina & Markač, at 106.
[1798] E.g., Đorđević, at 538.
[1799] Blaškić, at 52; Stakić, at 58-98; Krstić, at 135-144; Milošević, at 263-282; Rukundo, at 37-39.
[1800] Considering the general nature of the Appeals Chamber's reasoning, this explanation may be extended to revision of a trial judgment pursuant to alternate crimes or any other legal basis as well.

is effectively one such *alteration* to a trial chamber's legal reasoning".[1801] Further, it observed that "appellate bodies of various national jurisdictions are also empowered to enter convictions on an alternate basis of liability", referring to England & Wales, Western Australia, Germany, Canada, and Italy.[1802] Furthermore, the ICTY Appeals Chamber clarified that this power "is not dependent on whether the Prosecution appeals".[1803]

Even so, the Appeals Chambers have also referred to a significant limitation attaching to the power to "revise" a trial judgment. The ICTY Appeals Chamber has considered, in general, that it "will not enter convictions under alternate modes of liability where this would substantially compromise the fair trial rights of appellants or exceed its jurisdiction" to review "the findings of trial chambers for errors of law which invalidate a decision and errors of fact which occasion a miscarriage of justice".[1804] The specific assessments have, however, differed. On the one hand, the Appeals Chambers have referred to their jurisdictional inability to act as a primary trier of fact,[1805] combined with the impossibility of appealing new findings entered on appeal in certain situations.[1806] On the other hand, they have referred to the need to ensure, either separately or cumulatively, that the alternate legal basis has been pleaded adequately and/or that it has been sufficiently litigated on appeal.[1807]

In addition, in respect of appeals from sentencing decisions, the Appeals Chambers have made use of their power to "revise" by adjusting a sentence either upwards or downwards.[1808] However, their specific powers to do so have not been determined explicitly. In the first case

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[1801] Gotovina & Markač, at 106 (emphasis in original). According to a dissenting judge, the Appeals Chamber failed to distinguish between revising an appellant's conviction for a certain crime from one mode of liability to another and entering a new conviction on appeal. See: Gotovina & Markač, Dissenting Opinion of Judge Fausto Pocar, at 31-36.
[1802] Gotovina & Markač, at 106 (footnote 312).
[1803] Ibid., at 107.
[1804] Ibid., at 107.
[1805] Krajišnik, at 798.
[1806] E.g., Orić, at 186 (in conjunction with the Appeals Chamber's jurisdictional inability to act as a primary trier of fact); Gotovina & Markač, at 153 (in this regard, two judges held that this course of action is open to the Appeals Chamber, provided that it remains within the boundaries of the findings of fact established by the Trial Chamber. See: Gotovina & Markač, Dissenting Opinion of Judge Carmel Agius, at 87; Gotovina & Markač, Separate Opinion of Judge Patrick Robinson, at 3); Stanišić & Simatović, at 124. Furthermore, in Gotovina & Markač, the Appeals Chamber referred to similar jurisdictional limitations, i.e. a lack of relevant findings made by the Trial Chamber and erroneous findings of fact made by the Trial Chamber (Gotovina & Markač, at 115, 130-134, 148-149. Similar: Muvunyi I, at 148).
[1807] E.g., Stakić, at 58; Milošević, at 278; Krstić, at 137; Blaškić, at 52; Simić, at 84; Brđanin, at 361. The ICTY Appeals Chamber has also assessed whether constituent elements of an alternate crime had been pleaded sufficiently clearly. See: Đorđević, at 539.
[1808] E.g., Aleksovski, at 182-190; D. Nikolić Sentencing Appeal, at 87-97; M. Nikolić Sentencing Appeal, at 57-63, 94-113; Galić, at 444-456; Mrkšić & Šljivančanin, at 407-413.

in which this issue arose, the ICTY Appeals Chamber considered that "[a]ppellate review of sentencing […] in the major legal systems […] is usually exercised sparingly" and that it "has followed this general practice".[1809] Although this reasoning did not directly address its authority to adjust the sentence itself, it was subsequently invoked as the main basis.[1810]

10.1.1.4. Sentence Adjustment

Where the Appeals Chambers exercise their powers to "reverse" or "revise" in an appeal from the merits of a first instance judgment, it may be questioned whether, if applicable,[1811] they may adjust the sentence directly or whether the case should be remitted to a Trial Chamber for this purpose.[1812] These powers differ from the Ad Hoc Appeals Chambers' powers concerning sentencing appeals, as such. The latter are, as discussed, a specific component of their primary powers,[1813] but the former constitute a corollary of the Ad Hoc Appeals Chambers' powers to adjudicate errors of fact or law. In this regard, the ICTY Appeals Chamber has found that it may revise "the sentence meted out by the Trial Chamber, *although the latter did not necessarily commit a discernible error in the exercise of its sentencing discretion*".[1814]

In an early phase of its jurisprudence, the ICTY Appeals Chamber remitted cases to a Trial Chamber for sentencing after establishing an error of fact or law in respect of the merits of a trial judgment. For instance, without further clarification, it has noted that, "for the purposes of this case, it is sufficient for the [ICTY] Appeals Chamber to decide […] that it is competent to remit sentencing to a Trial Chamber and that in the circumstances of the case it is preferable to do so".[1815] In a subsequent case, it provided more indications as to the need to remit. In this regard, the ICTY Appeals Chamber noted that sentencing "lies within the discretion of the Trial Chamber", it "has had no submissions from the parties", "there may be matters of important principle involved", and "a new matter of such significance should be determined by a Chamber from which an appeal is possible".[1816] Nevertheless, the ICTY

[1809] Aleksovski, at 186-187.
[1810] E.g., Delalić et al., at 851; Vasiljević, at 181 (footnote 290).
[1811] Where a conviction is reversed into an acquittal on appeal, the question of adjustment of the sentence does not arise. Moreover, as discussed, the power to "reverse" is inapplicable in respect of appeals from a sentence imposed by a Trial Chamber.
[1812] Orders regarding a retrial constitute a separate matter. See: Part III, Chapter 10.1.2.
[1813] Part III, Chapter 9.1.2.
[1814] Blaškić, at 680 (emphasis supplied).
[1815] Order Remitting Sentencing to a Trial Chamber, *Prosecutor v. Tadić*, Case No. IT-94-1-A, ICTY, Appeals Chamber 10 September 1999.
[1816] Delalić et al., at 431, 711. Subsequently, an appeal was indeed instituted against the Trial Chamber's revision of the sentences. See: Mučić et al. Sentencing Appeal, at 5.

Appeals Chamber decided the grounds of appeal concerning sentencing itself on the merits, "[a]s it will be an issue as to whether any *adjustment* should be made to the sentences […], and not a complete rehearing on the issue of sentence" on remittal.[1817]

Nevertheless, where a trial judgment has been reversed or revised, the Ad Hoc Appeals Chambers have proceeded to adjust the sentence themselves in the vast majority of cases.[1818] Even so, their powers to do so have not been explicitly elucidated. For instance, after noting that the appellant had not raised a challenge, the ICTY Appeals Chamber simply held that it "accepts" the prosecution's submission "that it is possible for the Appeals Chamber to revise the sentence itself rather than remit the matter to the Trial Chamber".[1819] The Appeals Chamber's reasoning in a case involving additional evidence was marked by a similar paucity of reasoning. It noted that it "is being called upon […] to impose a sentence *de novo* […] on the basis of its own findings", which is "a function […] that it may perform in this case without remitting the case to the Trial Chamber".[1820]

10.1.2. Retrial

As mentioned, according to the RPE "[i]n appropriate circumstances the Appeals Chamber[s] may order that the accused be retried according to law".[1821] Since this power has not been exercised in respect of sentencing appeals, it will only be considered in connection with appeals taken from the merits of a trial judgment.

As is apparent from the references to "in appropriate circumstances" and "may" in the relevant rules,[1822] the Ad Hoc Appeals Chambers have stressed that this power is of a discretionary nature.[1823] In this regard, the ICTY Appeals Chamber held that "factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest" must be balanced "on a case by case

[1817] Delalić et al., at 712 (emphasis in original). In this regard, the Appeals Chamber found errors on the part of the Trial Chamber and instructed the latter to take them into account when imposing a revised sentence. See: ibid., at 726-851.
[1818] E.g., Simić, at 233, 235; Rutaganda, at 588-592; Kamuhanda, at 363-364; Krajišnik, at 801; Mrkšić & Šljivančanin, at 418-419; Nchamihigo, at 402-404; Setako, at 299; Đorđević, at 980; Šainović et al., at 1842-1846; Popović et al., at 2110-2116.
[1819] Krnojelac, at 263.
[1820] Blaškić, at 726.
[1821] E.g., Jelisić, at 73, 77; Krajišnik, at 799.
[1822] Rule 117(C) ICTY RPE; Rule 118(C) ICTR RPE.
[1823] E.g., Jelisić, at 73; Krajišnik, at 799.

basis".[1824] Further, the Appeals Chambers have added that "[a]n order for retrial is an exceptional measure to which resort must necessarily be limited".[1825] These factors have, in the aggregate, contributed to a sparse and inconsistent practice.

First, the Ad Hoc Appeals Chambers have provided limited reasoning as to the need to order a retrial. In certain situations, they have referred to specific factors. For instance, the ICTY Appeals Chamber has refused a retrial, considering that: the appellant had entered a guilty plea; the scope of the potential retrial would be limited; the appellant bore no responsibility for the Trial Chamber's error; the lapse of time between the events and the potential retrial; the limited resources of the ICTY; and the need for "psychological and psychiatric follow-up treatment" for the appellant.[1826] In addition, the ICTR Appeals Chamber has ordered a retrial, because "the alleged offence is of the utmost gravity and interests of justice would not be well served if retrial were not ordered to allow the trier of fact the opportunity to fully assess the entirety of the relevant evidence and provide a reasoned opinion".[1827] On the other hand, the Ad Hoc Appeals Chambers have also ordered, or declined to order, a retrial without any reasoning and simply noted that it "orders that […] [the accused] be retried"[1828] or that it "is not appropriate"[1829] or "not in the interests of justice"[1830] to order a retrial.

Second, the reasoning of the Appeals Chambers appears to clash in different respects. In this regard, the interrelationship between the mandate of the ICTY Appeals Chamber and the need to order a retrial has been explained in conflicting manners. The ICTY Appeals Chamber has considered itself unable to reverse or revise a trial judgment, because it would have had to review the entire trial record *de novo*, which would fall outside its mandate, and, in addition, it concluded that a retrial was not warranted.[1831] In direct contradiction with this ruling, it has ordered a retrial in another case, since it was not in a position to review the entire trial record *de novo.*[1832] Furthermore, the Appeals Chambers diverge in their assessments of the purpose of a retrial. As mentioned, the ICTR Appeals Chamber has ordered a retrial to allow the Trial

[1824] Jelisić, at 73.
[1825] Muvunyi I, at 148. Also: Krajišnik, at 799; Stanišić & Simatović, at 127.
[1826] Jelisić, at 74-76.
[1827] Muvunyi I, at 148.
[1828] Haradinaj et al., at 50.
[1829] Kupreškić et al., at 246.
[1830] Krajišnik, at 799.
[1831] Ibid., at 799.
[1832] Stanišić & Simatović, at 124-125, 127. The Appeals Chamber, in addition, referred to the gravity of the crimes at stake. See: ibid., at 127.

Chamber "to fully assess the entirety of the relevant evidence".[1833] It has, thus, assessed the need for a retrial in light of the Trial Chamber's primary responsibility concerning factual matters. However, the ICTY Appeals Chamber has required a preliminary evidentiary assessment to be made by itself before remanding a case for retrial. In this regard, it has found that a retrial "would serve no purpose" because the prosecution had failed to point to evidence in support of its allegations on appeal.[1834] This interpretation reveals, at least in part, an increased role for the Appeals Chamber in the determination of factual issues.

10.1.3. Inherent Powers

The ICTY Appeals Chamber, after mentioning its "inherent powers as an appellate body" in passing,[1835] has considered that its powers "in relation to an appeal are not limited to those expressly stated in Article 25 of the […] Statute or in Rule 117(C)" RPE, but that it "also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done".[1836] The ICTR Appeals Chamber has similarly noted its "inherent jurisdiction […] to do justice".[1837]

The Appeals Chambers' inherent powers are primarily reflected in the use of *proprio motu* powers.[1838] In its very first judgment, the ICTY Appeals Chamber held that it had "raised preliminary issues *proprio motu* pursuant to its inherent powers as an appellate body once seised of an appeal lodged by either party".[1839] The basis for this power arose out of the lack of a specific proscription to do so, as "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, […] would confine its consideration of the appeal to the issues raised formally by the parties". [1840] Whereas the ICTY Appeals Chamber initially indicated that its *proprio motu* powers are, in principle, related to errors of law,[1841] these powers have also been applied in respect of findings made pursuant to the

[1833] Muvunyi I, at 148.
[1834] Orić, at 186-187.
[1835] Erdemović, at 16.
[1836] Mučić et al. Sentencing Appeal, at 16. Also: Stanišić & Simatović, at 125.
[1837] Niyitegeka, at 200.
[1838] An important component of the Appeals Chambers' inherent powers concerns summary dismissals. These powers have been discussed *supra*. See: Part III, Chapter 7.1.5; Part III, Chapter 7.2.5.
[1839] Erdemović, at 16 (emphasis in original). Also: Akayesu, at 17.
[1840] Erdemović, at 16.
[1841] Jokić Sentencing Appeal, at 26. Most instances of *proprio motu* assessments indeed concern errors of law. See: e.g., Kunarac et al., at 145-148; Stakić, at 59; Kamuhanda, at 21-28; Renzaho, at 564-568; Bagosora & Nsengiyumva, at 736; Karera, at 360-370; Ndindabahizi, at 121-123.

"reasonableness standard"[1842] and sentencing errors.[1843] Subsequently, this power has been described in more narrow terms. Instead of raising grounds of appeal not brought forward by the parties, the Appeals Chambers have referred to their powers to grant grounds of appeal based on a varying argumentation. Thus, "if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point", as "[t]he Appeals Chamber may step in and, *for other reasons*, find […] that there is an error of law".[1844] Moreover, pursuant to their *proprio motu* powers, the Appeals Chambers have also extended errors of law and fact arising as a result of grounds of appeal formulated by a party in a multi-accused appeal to other parties who had not formally raised the same ground of appeal.[1845] They have referred to "reasons of fairness"[1846] and "the interests of justice"[1847] as the bases for such a course of action. Similarly, in relation to a particular ground of appeal, the ICTY Appeals Chamber has "*proprio motu* reviewed the trial record in fairness to" the accused.[1848]

However, an important restriction to the Appeals Chambers' inherent powers has been carved out in the jurisprudence of the Ad Hoc Tribunals.[1849] In this regard, the Appeals Chambers have found that they lack the ability to aggravate the position of the accused in the absence of a specific appeal instituted by the prosecution. Also described as "*reformatio in peius*",[1850] the Appeals Chambers have primarily applied this principle in respect of unchallenged indications of errors of fact or law pertaining to the merits of a trial judgment.[1851] It further extends to challenges raised by the prosecution in respect of the merits of a trial judgment that are not accompanied by a specific request for an increased sentence.[1852] In addition, this

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[1842] E.g., Boškoski & Tarčulovski, at 19-24.
[1843] E.g., Simić, at 269, 274; Naletilić & Martinović, at 610-613; Jokić Sentencing Appeal, at 26.
[1844] Furundžija, at 35 (emphasis supplied). However, the ICTY Appeals Chamber swiftly acted to prevent a dilution of the parties' obligation to provide supporting arguments. In a subsequent case, it noted that a party "must at least identify the alleged error and advance some arguments in support of its contention", since "[a]n appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber". Where appellants fail to do so, "the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake". See: Kupreškić et al., at 27. For an application of these powers, see: e.g., Brđanin, at 327; Kajelijeli, at 208-255; Naletilić & Martinović, at 109-122.
[1845] E.g., Delalić et al., at 414; Kupreškić et al., at 243; Šainović et al., at 551; Popović et al., at 1070.
[1846] Delalić et al., at 414.
[1847] Kupreškić et al., at 243.
[1848] Brđanin, at 67.
[1849] In addition, the impossibility of reconsidering an appellate judgment constitutes an important limitation of the Appeals Chambers' inherent powers. As this limitation is relevant to the post-appeal phase, it will not be discussed further. See: Introduction, Chapter 1.
[1850] Muvunyi I, at 170 (footnote 382).
[1851] E.g., Blaškić, at 648; Stakić, at 38; Krajišnik, at 318; Milošević, at 40.
[1852] E.g., Kupreškić et al., at 386-388; Krstić, at 216, 222, 227, 229, 269; Gatete, at 265.

principle relates to indications of erroneous exercises of sentencing discretion by Trial Chambers.[1853] The ICTR Appeals Chamber has also specified that this principle is germane to an order for retrial. In this regard, it has held that "given that the order for retrial originated in the appeal by […] [the accused], the Appeals Chamber considers that the principle of fairness demands that in the event that a new Trial Chamber was to enter a conviction for the respective charge, any sentence could not exceed the" original sentence.[1854]

10.1.4. Prosecutorial Appeals

Whereas the Ad Hoc Tribunals' Statutes equate the rights to appeal held by the convicted person and the Ad Hoc prosecutors,[1855] the powers of the Ad Hoc Tribunals to impose a final conviction instead of a first instance acquittal or irrevocably aggravate a first instance sentence have been mired in normative ambiguity and practical uncertainty.

10.1.4.1. Views

In one of the very first cases before the Ad Hoc Tribunals, the ICTY reversed various acquittals pronounced at first instance and imposed convictions instead.[1856] Beyond a declaration by one of the judges that "no general principle of law can be drawn from domestic practice" concerning the *non bis in idem* principle (or the Common Law variation of double jeopardy),[1857] the ramifications regarding the right to appeal of the accused were not examined. The Ad Hoc Appeals Chambers have, thereafter, routinely substituted acquittals for non-appealable convictions or aggravated sentences imposed at first instance.[1858] Even so, an intense debate on the compatibility of such convictions and sentences with the right to appeal guaranteed in international human rights law developed between individual judges.

Judge Pocar has vehemently argued that non-appealable convictions imposed in favour of acquittals violate the right to appeal contained in Article 14(5) ICCPR. He has supported this position with four arguments: (i) the statement in the Secretary General Report that "the right of appeal should be provided for under the Statute" as it is a "fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the" ICCPR; (ii)

[1853] E.g., Bralo Sentencing Appeal, at 85; Martić, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, at 1; Brđanin, at 505.
[1854] Muvunyi I, at 170.
[1855] Part III, Chapter 4.1.
[1856] Tadić, at 327.
[1857] Tadić, Declaration of Judge Nieto-Navia, at 8.
[1858] Also: Part III, Chapter 10.1.1.2.

the adoption of the ICCPR as "a resolution by the General Assembly", on the basis of which "[i]t would […] have to be assumed that the Security Council, as a U.N. body, would act in compliance with that declaration of principles"; (iii) the statement of the ICTY Appeals Chamber that "Article 14 […] [ICCPR] reflects an imperative norm of international law to which the Tribunal must adhere"; and (iv) the principle that, "in case of doubt as to whether a particular right exists, such a doubt must operate in favor of the accused".[1859] Academic commentators have, in majority, subscribed to this point of view.[1860]

On the other side of the spectrum, Judge Shahabuddeen has argued that the "special circumstances" of the Ad Hoc Tribunals justify a departure from the highest standards of the right to appeal developed in international human rights law.[1861] The first argument, which consists of two parts, posits that a more limited conception of the right to appeal applies to the Ad Hoc Tribunals. It has been said that the principles of the ICCPR should apply to the Ad Hoc Tribunals on the basis that they have been "given a benefit equivalent to the opportunity possessed by states to make reservations".[1862] Numerous domestic appellate systems allow for a conviction to be imposed for the first time on appeal without additional review and various States have appended concomitant reservations to Article 14(5) ICCPR.[1863] In addition, considering that other human rights instruments reject the reach ascribed to Article 14(5) ICCPR, such as Article 2 Protocol 7 ECHR, it has been claimed that the Ad Hoc Tribunals act "within the realm of permissible exceptions".[1864] The second argument is that the two-tier legal system of the Ad Hoc Tribunals necessarily prevents a further appeal and that the adoption of the HRC's interpretation of Article 14(5) ICCPR could create an interminable

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[1859] Rutaganda, Dissenting Opinion of Judge Pocar, at 2-3. Also Dissenting and Partially Dissenting Opinions of Judge Pocar in: Mrkšić & Šljivančanin, at 1-13; Semanza, at 1-4; Setako, at 1-6; Gatete, at 1-5; and Popović et al., at 2.

[1860] E.g., L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms … or Tied Down?', 19(3) *Leiden Journal of International Law* 847 (2006), at 854-855; L. O'Neill and G. Sluiter, 'The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia', 10 *Melbourne Journal of International Law* 596 (2009), at 625-626; M. Maystre, 'Controversial and Inconsistent Practice of the ICTY and ICTR Appeals Chamber with Respect to the Right to Appeal', in R. Kolb and D. Scalia (eds.), *Droit International Pénal* 483 (Basel: Helbing Lichtenhahn, 2012), at 503.

[1861] Rutaganda, Separate Opinion of Judge Shahabuddeen at 1-40; Semanza, Separate Opinion of Judge Shahabuddeen and Judge Güney, at 1-9. Judge Ramaroson has defended a similar position, but she has not invoked human rights considerations. See: Šainović et al., Opinion Dissidente du Juge Ramaroson, at 5. Furthermore, Judge Schomburg has also stated, without any analysis, that "[t]here is no provision in the Statute or in the Rules of Procedure and Evidence that would bar the Appeals Chamber from augmenting a sentence handed down by a Trial Chamber". Galić, Separate and Partially Dissenting Opinion of Judge Schomburg, at 3.

[1862] Rutaganda, Separate Opinion of Judge Shahabuddeen, at 21.

[1863] Part II, Chapter 2.3.4.

[1864] Rutaganda, Separate Opinion of Judge Shahabuddeen, at 28.

circle of appeals and remands, resulting in the waste of scarce judicial resources.[1865] Some support for this position exists in literature as well.[1866]

Despite their initial reticence, the Ad Hoc Appeals Chambers provided some reasoning as to their power to impose such convictions towards the final stages of their life spans. In this regard, the ICTR Appeals Chamber has held that "it is established jurisprudence that a new conviction may be entered at the appeal stage" and, in the accompanying footnote, it has referred to its implicit acceptance of this approach in preceding judgments.[1867] The ICTY Appeals Chamber has adopted a similar line of reasoning[1868] and referred, in addition, to its statutory powers to "affirm, reverse or revise the decisions taken by the Trial Chambers".[1869] However, this justification is primarily based on the evolving practice of the Ad Hoc Tribunals, which has never explicitly addressed the basis of the powers of the Ad Hoc Appeals Chambers to convert acquittals into irrevocable convictions in the first place. Even more strikingly, it omits any reference to international human rights law.

10.1.4.2. Practical Application

Besides normative uncertainty, the adjudication of prosecutorial appeals has yielded an inconsistent application of the Ad Hoc Appeals Chambers' powers.

First, the Appeals Chambers have adjudicated contentious issues of facts in disparate manners in relation to prosecutorial appeals. On the one hand, the Appeals Chambers have exhibited significant restraint in respect of factual matters raised in connection with such appeals. For instance, when reversing an acquittal, the ICTY Appeals Chamber specifically noted that the crime in question "was clearly charged in the Indictment and that the Trial Chamber made explicit findings on each element of the crime", which entailed that it "is thus able, if appropriate, to enter new convictions for this crime based solely on the findings of the Trial Chamber".[1870] Even more explicitly, the ICTY Appeals Chamber indicated that it was not in a

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[1865] Ibid., at 30-35.
[1866] B. Jia, 'The Right of Appeal in the Proceedings before the ICTY and ICTR', in G. Venturini and S. Bariatti (eds.), *Individual Rights and International Justice – Liber Fausto Pocar* 413 (Milan: Giuffre Editore, 2009), at 425.
[1867] Gatete, at 265.
[1868] Gotovina, at 107 (footnote 314).
[1869] Đorđević, at 928; Popović et al., at 539.
[1870] Popović et al., at 539. Also: Gacumbitsi, at 124. The Appeals Chambers have also implicitly relied exclusively on the findings of Trial Chambers. See: Krnojelac, at 161-172, 176-180, 183-188, 192-207, 214-247; Rutaganda, at 569-585; Galić, at 455; Semanza, at 355-364, 367-371; Setako, at 256-262. Also: Gotovina &

position to make certain inferences itself. After establishing errors of law on the part of a Trial Chamber, it did not proceed to analyse the evidence with a view to entering convictions, because "it would have to analyse the entire trial record without the benefit of having directly heard the witnesses".[1871] On the other hand, despite their proclaimed limitations in relation to issues of fact, the Appeals Chambers have adopted new findings of fact based either on general considerations addressed by a Trial Chamber or on evidence not fully explored by it in the context of prosecutorial appeals. As to the former, the ICTR Appeals Chamber, for instance, has reviewed a "Trial Chamber's factual conclusions and the evidence contained in the trial record" with the understanding that "the law should be applied to the factual findings of the Trial Chamber, taken as a whole".[1872] However, a dissenting judge has noted in this respect that the majority "consistently supplements the Trial Chamber's findings with the testimony of witnesses simply because the 'Trial Chamber found them to be credible'".[1873] An example of the latter category is reflected in the finding of the ICTY Appeals Chamber that "the only reasonable conclusion that can be drawn is" that the accused had formed the required *mens rea* for a charge levelled against him on the basis of a particular circumstance, even though the Trial Chamber had dismissed this possibility as "conjecture".[1874]

Second, differing outcomes have been attached to errors of law or fact in respect of a (partial) acquittal or the sentence imposed. As set forth in the preceding description,[1875] the Appeals Chambers have prioritised their powers to conclusively settle questions of law and fact on appeal over the possibility of remitting a case to a Trial Chamber. Prosecutorial appeals form no exception in this regard. Accordingly, in the majority of situations, the Appeals Chambers have either imposed aggravated sentences following an erroneous exercise of sentencing discretion by a Trial Chamber or vacated acquittals in favour of convictions in combination with increased sentences as a result of an error of law or fact committed by a Trial

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Markač, Dissenting Opinion of Judge Carmel Agius, at 87; Gotovina & Markač, Separate Opinion of Judge Patrick Robinson, at 3.

[1871] Stanišić & Simatović, at 124-125, 127. Similar: Delalić et al., at 313. Also: Kamuhanda, Separate and Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, at 395-399.

[1872] Seromba, at 161-162.

[1873] Seromba, Dissenting Opinion of Judge Liu, at 11.

[1874] Mrkšić & Šljivančanin, at 61-62. Similar: Lukić & Lukić, Dissenting Opinion of Judge Morrison, at 29, who notes that the conclusions of the Majority "are based upon extracts taken from the Trial Chamber's summaries of evidence contained in the Prosecution case, portions of evidence which were not subject to findings of the Trial Chamber".

[1875] Part III, Chapter 10.1.1.2; Part III, Chapter 10.1.1.3; Part III, Chapter 10.1.1.4; Part III, Chapter 10.1.2.

Chamber,[1876] although it has remitted such cases on occasion too.[1877] Conversely, however, the Appeals Chambers have also resorted to less drastic measures. The primary manifestation of this current of the jurisprudence is reflected in the Appeals Chambers' refusals to impose additional convictions, in spite of findings that an error of fact or law has been committed by a Trial Chamber.[1878] Even though no reasoning had been provided at the outset, the ICTY Appeals Chamber subsequently considered that, in light of the reference to "*may* affirm, reverse or revise" in Article 25(2) ICTY Statute, its prerogatives are of a discretionary nature, which must "be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest […] on a case by case basis".[1879]

10.2. ICC

Compared to the legal texts of the Ad Hoc Tribunals, the ICC Statute determines the powers of the ICC Appeals Chamber in a more explicit and extensive manner. It regulates the power to extend the remit of appellate proceedings concerning the sentence to include alleged errors affecting the merits of the trial judgment and *vice versa*,[1880] to "[r]everse or amend the decision",[1881] to "[o]rder a new trial before a different Trial Chamber",[1882] to "remand a factual issue to the original Trial Chamber" or to "itself call evidence to determine" a factual issue",[1883] and to "vary the sentence".[1884] After discussing these powers, the status of the inherent powers of the ICC Appeals Chambers and its indications as to a possible approach to successful prosecutorial appeals will be assessed.

10.2.1. Remit of Appellate Proceedings

The ICC Statute explicitly permits the ICC Appeals Chamber to extend the remit of its proceedings.[1885] It stipulates that, "[i]f on an appeal against sentence the Court considers that

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[1876] E.g., Krnojelac, at 161-172, 176-180, 183-188, 192-207, 214-247, 263-264; Mrkšić & Šljivančanin, at 61-103, 419; Galić, at 455-456, p. 187; Semanza, at 355-364, 367-371, p. 130; Seromba, at 161-191, 240; Gacumbitsi, at 124, 207.
[1877] Part III, Chapter 10.1.1.4; Part III, Chapter 10.1.2.
[1878] E.g., Aleksovski, at 153; Karemera & Ngirumpatse, at 713; Šainović et al., at 1604, 1766.
[1879] Šainović et al., at 1604 (footnote 5269), 1766 (footnote 5752).
[1880] Art. 81(2)(b)-(c) ICC Statute.
[1881] Art. 83(2)(a) ICC Statute.
[1882] Art. 83(2)(b) ICC Statute.
[1883] Art. 83(2) ICC Statute.
[1884] Art. 83(3) ICC Statute.
[1885] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1546-1547; P. De Cesari, 'Observations on the Appeal before the International Criminal Court', in M.

there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds […] [of appeal], and may render a decision on conviction […]".[1886] This procedure also applies "when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence".[1887] These powers have not been applied in the early jurisprudence of the ICC Appeals Chamber.

Whereas the second aspect must undoubtedly operate in the favour of the accused, on account of the reference to "reduce the sentence",[1888] there is some disagreement among scholars on the first aspect. It has been argued, on the one hand, that the extension of a sentencing appeal to the grounds underlying the conviction "seems to grant the [ICC] Appeals Chamber the discretion […] to review the verdict itself – even if this should prove detrimental to the accused",[1889] which "might happen, e.g. if the Trial Chamber has passed a separate verdict on each item of the indictment".[1890] On the other hand, although no specific reasoning has been set out, it has been maintained that the prohibition of *reformatio in peius* extends to this aspect of the ICC Appeals Chamber's powers too.[1891] The former view appears to be based on the reference to the ICC Appeals Chamber's power to "render a decision on *conviction*",[1892] upon *proprio motu* review. Although the provision's drafting is unfortunate, the latter view is to be preferred. This power does not envisage the reversal of an acquittal into a conviction. An acquittal obviously does not entail a sentence and, therefore, an appeal from the sentence, as required by the relevant provision of the ICC Statute, is impossible. Moreover, read in context, the power to "render a decision on conviction" only applies where the ICC Appeals Chamber deems "that there are grounds on which the conviction *might be set aside*".[1893] This

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Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: a Challenge to Impunity* 225 (Aldershot: Ashgate, 2001), at 229.

[1886] Art. 81(2)(b) ICC Statute.

[1887] Art. 81(2)(c) ICC Statute.

[1888] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1546-1547. Also: C. Staker and F. Eckelmans, 'Article 81', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1915 (München: Verlag C.H. Beck, 2016), at 1921.

[1889] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1546.

[1890] Ibid., at footnote 50.

[1891] C. Staker and F. Eckelmans, 'Article 81', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1915 (München: Verlag C.H. Beck, 2016), at 1921; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 955.

[1892] Art. 81(2)(b) ICC Statute (emphasis supplied).

[1893] Ibid. (emphasis supplied).

qualifier prevents *proprio motu* adjustments of the grounds underlying a conviction to the detriment of the accused in the context of an appeal from the sentence.

10.2.2. Appeal from Conviction or Acquittal

The principal powers of the ICC Appeals Chamber are to "[r]everse or amend the decision" or […] [o]rder a new trial before a different Trial Chamber".[1894] This provision of the ICC Statute further stipulates that, "[f]or these purposes, the [ICC] Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue".[1895]

As a preliminary issue, it may be noted that, contrary to the Ad Hoc Tribunals' Statutes,[1896] the power to "affirm" a decision of conviction or acquittal has not been explicitly set forth in the ICC Statute. However, this power forms an implicit part of the relevant appellate provisions, in a manner similar to the Ad Hoc Tribunals. First, the ICC Appeals Chamber has explicitly "confirm[ed]" impugned decisions in its early jurisprudence where grounds of appeal were found to lack merit.[1897] Second, alike the Ad Hoc Tribunals, even where an error has been established, but the ICC Appeals Chamber does not find "that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error",[1898] the powers to "[r]everse or amend the decision" remain dormant and the logical outcome is that the decision of conviction or acquittal is affirmed. Indeed, the ICC Appeals Chamber has found that procedural, legal, and factual errors had not "materially affected" judgments of conviction and acquittal in its early jurisprudence.[1899]

[1894] Art. 83(2)(a)-(b) ICC Statute.
[1895] Art. 83(2) ICC Statute.
[1896] Part III, Chapter 10.1.1.1.
[1897] Lubanga, at 529; Ngudjolo, at 296.
[1898] Arts. 81(1), 83(2) ICC Statute.
[1899] In respect of a procedural error, the ICC Appeals Chamber has, e.g., found that, "the Trial Chamber's failure […] may indeed have substantially affected the Trial Chamber's observations concerning the witness's demeanour and many contradictions in his testimony", but that, ultimately, the Trial Chamber's rejection of the witness' "testimony as unreliable was based on other findings of the Trial Chamber that were independent of its observations on the witness's demeanour". See: Ngudjolo, at 291. With regard to an error of law, the ICC Appeals Chamber has concluded that an impugned decision of conviction was not materially affected by an error of law, considering that the remainder of the Trial Chamber's findings was legally unimpeachable. See: Lubanga, at 340. In respect of errors of fact, the ICC Appeals Chamber has confirmed that the most obvious example of an error of fact that has not "materially affected" the decision in question is where the impugned finding continues to be supported by other evidence. See: Lubanga, at 362, 433. Furthermore, based on the jurisprudence of the Ad Hoc Tribunals, the ICC Appeals Chamber has applied an analogous distinction in respect of prosecutorial appeals and defence appeals in relation to this criterion. Thus, "given that the onus is on

10.2.2.1. Reverse or Amend

As to the power to "[r]everse", the ICC Appeals Chamber has, similarly to the Ad Hoc Tribunals,[1900] indicated a willingness to directly resolve contentious issues of fact. For instance, after finding that a Trial Chamber had not addressed a relevant issue, it referred to the underlying evidence itself and concluded that the Trial Chamber's finding was unreasonable.[1901] Had the ICC Appeals Chamber been minded to apply a more cautious approach, it might have considered a remittal in light of the absence of a finding of fact.

With respect to the power to "amend", which corresponds to the power to "revise" in the Ad Hoc Tribunals' Statutes,[1902] it has been remarked that "[i]t is an open question whether the ICC Appeals Chamber may change the legal characterisation of the facts pursuant to regulation 55 of the [ICC] Regulations of the Court".[1903] This position corresponds to a literal interpretation of the ICC Statute, similar to the Ad Hoc Tribunals' Statutes.[1904]

However, the ICC Appeals Chamber will have to decide on the distinct issue of whether it may derive a power to adjust the sentence from its powers to "[r]everse or amend" or whether the case ought to be referred back for sentencing. The ICC Statute appears to be more inclined towards a direct adjustment of the sentence by the ICC Appeals Chamber than towards a remittal.[1905] It mentions that the power to "[r]everse or amend" applies to both the "decision or sentence appealed from",[1906] whereas it separately sets forth that, "in an appeal against sentence", the ICC Appeals Chamber "may vary the sentence".[1907] The repeated references to an appeal from a sentence engender a lack of clarity. However, it seems more appropriate to

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the Prosecutor to prove the guilt of the accused", the ICC Appeals Chamber has also found that a convicted person must establish reasonable doubt as to his guilt and the prosecutor must demonstrate that all reasonable doubt has been eliminated. See: Ngudjolo, at 25-26.

[1900] Part III, Chapter 10.1.1.2.2.

[1901] Lubanga, at 358-360. However, it subsequently concluded that the error had not materially affected the impugned decision. See: ibid., at 362.

[1902] Part III, Chapter 10.1.1.3.

[1903] C. Staker and F. Eckelmans, 'Article 83', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1965 (München: Verlag C.H. Beck, 2016), at 1967. As noted, the Ad Hoc Appeals Chambers have mainly invoked this power to revise modes of liability entered by Trial Chambers. See: Part III, Chapter 10.1.1.3.

[1904] Part III, Chapter 10.1.1.3.

[1905] Similar: C. Staker and F. Eckelmans, 'Article 83', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1965 (München: Verlag C.H. Beck, 2016), at 1970.

[1906] Art. 83(2)(a) ICC Statute.

[1907] Art. 83(3) ICC Statute.

read the reference to the "sentence appealed from" in respect of the powers to "[r]everse or amend" as establishing a power to adjust the sentence following a successful appeal against the merits of a decision of acquittal or conviction. This interpretation gives effect to the distinct expression "sentence appealed from" and recognises, at the same time, the independent application of the power to "vary the sentence" in an appeal specifically instituted against a sentence imposed at first instance.

10.2.2.2. New Trial

The power to "[o]rder a new trial" is formulated in the alternative to the powers to "[r]everse or amend",[1908] which is not dissimilar from the legal texts of the Ad Hoc Tribunals.[1909] Moreover, like the Ad Hoc Tribunals' texts, the ICC Statute does not regulate when the ICC Appeals Chamber should resort to its powers to "[r]everse or amend" and when it should put its power to "[o]rder a new trial" into effect.[1910]

10.2.2.3. Remand Factual Issues or Call Evidence

Although the powers of the ICC Appeals Chamber to "remand a factual issue" or to "itself call evidence" appear to be more broadly formulated than those of the Ad Hoc Appeals Chambers, the differences are minimal in practice. As noted, the Ad Hoc Appeals Chambers have repeatedly called evidence themselves to determine factual issues on appeal.[1911] In addition, whereas they have not remanded particular issues of fact, they have, in a similar vein, ordered new trials on distinct counts.[1912]

10.2.3. Appeal from Sentence

Contrary to the Ad Hoc Statutes,[1913] the ICC Appeals Chamber has been afforded the explicit power to "vary the sentence" in an appeal from the sentence.[1914] Although the ICC Statute does not explicitly set forth the power to "confirm" a sentence, this power is, as with appeals from decisions of acquittal or conviction,[1915] implicit in the relevant provision.[1916]

[1908] Art. 83(2)(a)-(b) ICC Statute, which refers to "or".
[1909] Part III, Chapter 10.1.2.
[1910] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1556.
[1911] Part III, Chapter 8.1.2; Part III, Chapter 9.1.1.2.2.1.
[1912] Part III, Chapter 10.1.2.
[1913] Part III, Chapter 10.1.3.
[1914] Art. 83(3) ICC Statute.
[1915] Part III, Chapter 10.2.2.

Furthermore, the ICC Statute does not expressly permit a new trial to be ordered for the pronouncement of a new sentence. Construed strictly, this omission may be seen as the complete exclusion of such a possibility. However, construed more broadly on account of the permissive language of the relevant provision, which indicates that the ICC Appeals Chamber "*may* vary the sentence",[1917] a retrial for sentencing purposes would remain a possibility.

As referred to previously,[1918] the relevant provision of the ICC Statute is mired in ambiguity. In addition to the power to "vary the sentence", it also refers to the power to "[r]everse or amend […] the sentence" in the context of an appeal against a decision of acquittal or conviction.[1919] The ICC Appeals Chamber has not clarified the interrelationship between these bases and has referred to both of them interchangeably in its early jurisprudence.[1920] However, it is submitted that a distinction is preferable. As discussed,[1921] the better reading is to construe the power to "[r]everse or amend […] the sentence" as referring to the prerogative to alter the sentence once an appeal against the merits of a decision of acquittal or conviction has been granted. Specific appeals from the sentence would, accordingly, fall within the remit of the ICC Appeals Chamber's power to "vary the sentence". This particular provision refers directly to the disproportion between the sentence and the crime,[1922] which is the specific ground of appeal relative to appeals from a sentence,[1923] whereas the reference to "[r]everse or amend […] the sentence" does not invoke this ground of appeal.[1924] Furthermore, in contrast to the latter power, the power to "vary the sentence" is to be exercised on the basis of Part 7 of the ICC Statute,[1925] which is entitled "Penalties", and, thus, directly extends the Trial Chambers' concomitant powers to the ICC Appeals Chamber.

[1916] Where one or both conditions for a successful appeal from a sentence – i.e. the establishment of the disproportion between the sentence and the crime and that the sentence has been materially affected by the error in question - have or have not been demonstrated, the only logical outcome for the ICC Appeals Chamber is to confirm the sentence. Indeed, the ICC Appeals Chamber has done so in its early jurisprudence. See: Lubanga Sentencing Appeal, at 119.
[1917] Art. 83(3) ICC Statute (emphasis supplied).
[1918] Part III, Chapter 10.2.2.
[1919] Art. 83(2)(a) ICC Statute.
[1920] Lubanga Sentencing Appeal, at 38-42.
[1921] Part III, Chapter 10.2.2.
[1922] Art. 83(3) ICC Statute.
[1923] Art. 81(2)(a) ICC Statute.
[1924] Art. 83(2)(a) ICC Statute.
[1925] Art. 83(3) ICC Statute.

10.2.4. Inherent Powers

The ICC Appeals Chamber has not invoked any inherent powers in its early jurisprudence. However, a power classified as inherent by the Ad Hoc Appeals Chambers[1926] has been expressly regulated in the ICC Statute. The aforementioned power of the ICC Appeals Chamber to extend the remit of its appellate proceedings may "merely give expression to what would in any event fall within the inherent powers of the [ICC] Appeals Chamber".[1927] This is also the case for the main limitation to the Ad Hoc Appeals Chambers' inherent powers.[1928] In this regard, the ICC Statute provides that, "[w]hen the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment",[1929] which extends, as discussed, to the power of the ICC Appeals Chamber to extend the remit of appellate proceedings too.[1930]

10.2.5. Prosecutorial Appeals

A combined reading of the relevant provisions of the ICC Statute permits, in principle, the unassailable aggravation of the position of the accused on appeal. As discussed, the ICC Statute has established a two-tier institutional structure,[1931] allows for appeals by the ICC prosecutor against decisions of acquittal or conviction and against the sentence,[1932] and authorises the ICC Appeals Chamber to "[r]everse or amend" a decision and to "vary the sentence", in respect of which the possibility of "[o]rder[ing] a new trial" is expressed as an alternative to instantaneous appellate resolution.[1933] Indeed, the ICC Appeals Chamber has held that it may order a "new trial or […] *reverse the acquittal and enter a conviction*".[1934]

Even so, the ICC Appeals Chamber has not been in a position to provide specific indications as to the approach to successful prosecutorial appeals, since it has rejected such appeals in its early jurisprudence.[1935] Even so, it appears to be cautiously inclined in this regard. In the context of its discussion on the requirement that a decision must be "materially affected" by

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[1926] Part III, Chapter 10.1.3.
[1927] C. Staker and F. Eckelmans, 'Article 81', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1915 (München: Verlag C.H. Beck, 2016), at 1921.
[1928] Part III, Chapter 10.1.3.
[1929] Art. 83(2) ICC Statute.
[1930] Part III, Chapter 10.2.1.
[1931] Part III, Chapter 2.1.1.
[1932] Part III, Chapter 4.1.
[1933] Part III, Chapter 10.2.2.
[1934] Ngudjolo, at 284 (emphasis supplied).
[1935] Lubanga Sentencing Appeal, at 119; Ngudjolo, at 296.

an error, it has found that "this requirement is explained by the fact that a Trial Chamber's decision, at the end of what will often have been a lengthy trial, should not be disturbed lightly", which applies "*[i]n particular in the case of an acquittal*".[1936]

10.3. Evaluation

10.3.1. Appellate Conviction Revoking Acquittal

The aforementioned debate with respect to the question of irrevocable appellate convictions essentially entails a bifurcated choice. The Ad Hoc Tribunals should either adhere to the relevant interpretation afforded to Article 14(5) ICCPR or they should have the leeway to apply the more limited version of the right to appeal, as embodied in Article 2(2) Protocol 7 ECHR.[1937] However, this dichotomy should be rejected.

Two reasons militate against the adoption of Article 14(5) ICCPR (and Article 8(2)(h) ACHR) as the guiding norm concerning vacated acquittals in favour of irreversible convictions before the Ad Hoc Tribunals and the ICC. First, as discussed, there is insufficient support for the HRC's interpretation of Article 14(5) ICCPR and, on this basis alone, the current state of international human rights law does not establish a clear-cut obligation for the Ad Hoc Tribunals and the ICC to provide further appellate review upon substituting an acquittal for a final conviction.[1938] Second, even if this argument were rejected, the supporting claims of Judge Pocar provide an insufficient foundation for the application of Article 14(5) ICCPR in this context. According to Judge Pocar, the preceding considerations are irrelevant, considering that the Security Council has adopted the Secretary General Report without departing explicitly from the relevant language concerning the right to appeal.[1939] In other words, Article 14(5) ICCPR, including the relevant views of the HRC, has become part of the internal law of the Ad Hoc Tribunals and exerts binding force on this basis.[1940] However, the underlying claims are either too indeterminate or even explicitly depart from the relevant interpretation of Article 14(5) ICCPR. Commencing with the former, the finding of the ICTY Appeals Chamber that "Article 14 […] [ICCPR] reflects an imperative norm of international

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[1936] Ngudjolo, at 284 (emphasis supplied).
[1937] Part III, Chapter 10.1.4.
[1938] Part II, Chapter 6.2.2.
[1939] Rutaganda, Dissenting Opinion of Judge Pocar, at 2-3.
[1940] L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms … or Tied Down?', 19(3) *Leiden Journal of International Law* 847 (2006), at 854-855.

law" has arisen in the context of a contempt case in which the ICTY Appeals Chamber has acted as a court of first instance.[1941] Accordingly, the reference to Article 14(5) ICCPR concerned the matter whether a right to appeal, as such, should be provided and it was, therefore, disconnected from the question whether an appellate conviction replacing a first instance acquittal triggers a right to additional review. Furthermore, and more importantly, the Secretary General Report, in fact, departs from the need to provide such review. It explicitly accords a right to appeal to the prosecutor, which is a necessary pre-condition to convert an acquittal into an appellate conviction, and it notes that Appeals Chamber judgments "[…] revising the judgement of the Trial Chamber would be *final*", which prevents a further appeal against an appellate conviction.[1942] As discussed, the Ad Hoc Appeals Chambers' powers of remittal are merely discretionary and do not detract from their powers to conclusively determine matters of law and fact.[1943] These indications suffice to dispel doubt as to the rights of the accused in respect of this element of the right to appeal.

However, this conclusion does not entail a resort to the position of Judge Shahabuddeen or the more general position of the full Ad Hoc Appeals Chambers, even though this position coincides, in essence, with the aforementioned rejection of Article 14(5) ICCPR as a basis for this element of the right to appeal at the Ad Hoc Tribunals and the ICC. First, the supporting arguments advanced by Judge Shahabuddeen are unconvincing. The equivalent benefit to enter reservations, which would accrue to the Ad Hoc Tribunals, is inapplicable as "international organisations […] cannot be regarded as direct addressees of" human rights instruments and, even if they could, "reservations can only be made at the point of expression of consent to be bound by that treaty".[1944] Moreover, besides the question of whether logistical considerations may serve as a basis to limit standards of international human rights law,[1945] the argument that, in the Ad Hoc Tribunals' two-tier structure, there is no higher body to hear further appeals ignores the fact that, in international human rights law, the element of "a higher court" is encapsulated by the requirement to provide appellate review of sufficient

[1941] Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, *Prosecutor v. Tadić*, Case No. IT-94-1-A-AR77, ICTY, Appeals Chamber, 27 February 2001.
[1942] U.N. Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, at 117-118 (emphasis supplied).
[1943] Part III, Chapter 10.1.2.
[1944] M. Fedorova and G. Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings', 3(1) *Human Rights & International Legal Discourse* (2009), at 36-37.
[1945] Nyiramasuhuko et al., at 376.

scope.[1946] Second, this position suffers from two fundamental shortcomings. It attaches insufficient weight to the risk of error in the judicial process. In the context of international criminal law, factual errors may result from, *inter alia,* the scope and complexity of the issues at stake and the temporal and physical distance between the occurrence of the alleged crimes and the production of the evidence, whereas the emerging state of the law may occasion legal errors. The risk of error is compounded by the fact that the Ad Hoc Tribunals and the ICC operate in a legal vacuum. Therefore, legal and factual evaluations are not subject to review by a court of third instance, as is the case in many domestic systems of criminal procedure,[1947] and elementary fair trial issues may not be brought before an external mechanism, such as the HRC or the ECtHR. Moreover, this view underrates the exigencies imposed by international human rights law. It mechanically resorts to a more limited conception of the right to appeal, as reflected, primarily, by Article 2(2) Protocol 7 ECHR, according to which acquittals may be unreservedly converted into convictions on appeal. It, therefore, fails to take account of the continued applicability of Article 6 ECHR to appellate proceedings and the additional safeguards demanded in respect of appellate convictions imposed in favour of acquittals.[1948] In this regard, it is striking that some of these safeguards have been applied by the Ad Hoc Appeals Chambers in an analogous situation, i.e. the alteration of convictions.[1949]

Therefore, the Ad Hoc Tribunals powers to "reverse" an acquittal in favour of a final conviction are, in principle, not contrary to an aggregate view of the relevant standards of international human rights law.[1950] This conclusion necessarily extends to the associated power to impose a new sentence.[1951] However, it also entails that the Ad Hoc Tribunals and the ICC are under an obligation to apply the safeguards pertaining to the possibility of a final conviction imposed first on appeal.[1952] Considering that the ICC Appeals Chamber has not put its corresponding powers to effect in its early jurisprudence, no conclusion can be reached in this regard. The Ad Hoc Tribunals, on the other hand, have not applied the necessary compensatory safeguards accompanying such a power, albeit to differing degrees.

[1946] Part II, Chapter 5.1.3.2.
[1947] Part III, Chapter 2.1.1.
[1948] Part II, Chapter 6.2.2.
[1949] Part III, Chapter 10.1.1.3.
[1950] Part III, Chapter 10.1.1.2.
[1951] Part III, Chapter 10.1.1.4.
[1952] Similar: Šainović et al., Opinion Dissidente du Juge Ramaroson, at 3-4.

In general, first instance acquittals have been converted into appellate convictions without a sufficient degree of appellate scrutiny. As discussed, the appellate processes of the Ad Hoc Tribunals consist, in the main, of written submissions.[1953] However, in a situation as intrusive as an unreviewable conviction imposed instead of a first instance acquittal, appellants must be enabled to more intensely challenge the legal and factual basis that may engender such a conviction, as established *supra.* Even though the Ad Hoc Appeals Chambers possess, in principle, far-reaching powers,[1954] they have not wielded such powers so as to sufficiently broaden the remit of their appellate proceedings. Instead, they have based such convictions on the Trial Chambers' findings, supplemented by the parties' submissions.[1955]

Moreover, a final conviction pronounced for the first time by the Ad Hoc Appeals Chambers has failed to provide sufficient notice to the person concerned and/or has been grounded in elements extrinsic to the original charges on at least one occasion. A Trial Chamber had not entered into an assessment of certain matters of fact, dismissing them as "conjecture", and acquitted the accused on this count.[1956] However, on the basis of these considerations, the ICTY Appeals Chamber has drawn an inference as to a critical legal element and has proceeded to reverse the acquittal in respect of this count.[1957] Upon an application for review, the ICTY Appeals Chamber has had to concede that it had entered a "new factual finding" in this regard,[1958] which reveals that this element had not been litigated.

10.3.2. Aggravation of Sentence

As discussed, the state of international human rights law is better defined in respect of the possibility of entering an aggravated sentence on appeal vis-à-vis the ability to quash an acquittal in favour of an unreviewable conviction. Contrary to Judge Pocar's position, the HRC has, in fact, determined that, barring a far-reaching characterization of the underlying offence, Article 14(5) ICCPR has not been considered violated in respect of appellate confirmations of inferior convictions accompanied by aggravated sentences.[1959] It is unsurprising that the exception foreseen in Article 2(2) Protocol 7 ECHR regarding appellate

[1953] Part III, Chapter 8.1.
[1954] Part III, Chapter 10.1.
[1955] Part III, Chapter 10.1.4.2.
[1956] Mrkšić & Šljivančanin, at 61-62.
[1957] Ibid.
[1958] Review Judgement, *Prosecutor v. Šljivančanin*, Case No. IT-95-13/l-R.1, ICTY, Appeals Chamber, 8 December 2010, at 4, 32.
[1959] Part II, Chapter 5.1.1.3.3; Part II, Chapter 6.1.

convictions following an acquittal has been extended to similar circumstances.[1960] There is, accordingly, a significant degree of overlap between these instruments, seeing that neither legal basis is considered violated if, within the aforementioned perimeters, an appellate court aggravates a final sentence.[1961] Accordingly, although the ICC has not employed its power to "vary the sentence" in this manner in its early jurisprudence,[1962] the few instances in which the Ad Hoc Tribunals have augmented sentences without adjusting the underlying conviction or irrespective thereof, are not, as such, contrary to international human rights law.[1963]

10.3.3. Alteration of Conviction

The HRC and the ECtHR have adopted a similar interpretation of the corresponding provisions of the ICCPR and the ECHR, namely Article 14(3)(a) ICCPR and Article 6(3)(a) ECHR, in relation to the powers of appellate courts to irrevocably alter the basis of a conviction. Such a power is not contrary to the commonly shared norm "[t]o be informed promptly and in detail […] of the nature and cause of the charge",[1964] provided that any type of requalification is appropriately communicated to the person concerned and a sufficient opportunity to respond to a possible requalification is afforded.[1965] Thus, whereas the Ad Hoc Tribunals and the ICC are not barred from invoking their respective powers to "reverse" or "amend" in this manner, these bases establish a clear-cut obligation to refrain from employing these powers in so far as they deny sufficient notice of the charges.

Whereas the ICC Appeals Chamber has not brought its power to "amend" into play in its early jurisprudence, the Ad Hoc Appeals Chambers have done so frequently. Even so, they have, in general, remained within the permissible boundaries established by human rights law. Although the specific reasoning has differed, the Ad Hoc Tribunals have, to a larger degree in comparison with the application of their power to "reverse", considered whether their resort to the power to "revise" has entailed fair trial considerations, including the right "[t]o be informed promptly and in detail […] of the nature and cause of the charge".[1966]

[1960] Part II, Chapter 3.3.5; Part II, Chapter 5.1.1.3.3.
[1961] Part II, Chapter 5.1.1.3.3.
[1962] Part III, Chapter 10.2.3.
[1963] Part III, Chapter 10.1.1.3. However, see: Part III, Chapter 11.
[1964] This formulation is employed in Article 14(3)(a) ICCPR. Article 6(3)(a) is slightly differently worded, which does not alter the scope of the protection provided.
[1965] Part II, Chapter 5.1.4.5; Part II, Chapter 6.1.
[1966] Part III, Chapter 10.1.1.3.

This conclusion entails that the corresponding powers to adjust the sentence of the Ad Hoc Tribunals,[1967] and possibly the ICC,[1968] fall in line with human rights standards as well. Although the human rights monitoring bodies and courts have not confirmed so in an outright manner, this may be deduced from the fact that both the HRC and the ECtHR have not found fault with the adjustment of a sentence on appeal, either upward or downwards, where a first instance conviction had been altered in conformity with the right "[t]o be informed promptly and in detail […] of the nature and cause of the charge".[1969]

10.3.4. Regulation of Appeals Chambers' Powers

The regulation of the powers of the Appeals Chambers of the Ad Hoc Tribunals and the ICC must, arguably, comply with the outer limits of the discretion to regulate the appellate process recognised in international human rights law as well.[1970]

Whereas the fledgling jurisprudence of the ICC has not revealed severe forms of inconsistency in respect of the application of the powers of the ICC Appeals Chamber,[1971] the practical application of several aspects of the powers of the Ad Hoc Appeals Chambers has fluctuated considerably. Three such aspects stand out. First, in respect of errors of law established by the Ad Hoc Appeals Chambers, it has remained unclear whether they should apply an autonomous or detached standard of review and whether they are constrained by the evidence considered by the Trial Chambers or may invoke evidence not directly assessed by them.[1972] Second, it remains highly uncertain when the Ad Hoc Appeals Chambers should resort to conclusive determination and when to remittal to a Trial Chamber.[1973] Finally, prosecutorial appeals have been approached in varying manners. In respect of factual issues, the Ad Hoc Appeals Chambers have either been constrained by the findings of the Trial Chamber or adopted additional findings.[1974] Furthermore, the outcomes of such appeals have varied, ranging from conclusive adjudication and remittal to alternative approaches that acknowledge errors but attach no consequences to the convicted or acquitted person.[1975]

[1967] Part III, Chapter 10.1.1.4
[1968] Part III, Chapter 10.2.2.1.
[1969] Part II, Chapter 5.1.4.5.
[1970] Part II, Chapter 5.1.3.1; Part II, Chapter 6.1.
[1971] Part III, Chapter 10.2.2; Part III, Chapter 10.2.3.
[1972] Part III, Chapter 10.1.1.2.1.
[1973] Part III, Chapter 10.1.2.
[1974] Part III, Chapter 10.1.4.2.
[1975] Ibid.

The application of these aspects of the powers of the Ad Hoc Appeals Chambers falls short of the requirement of a reasonable degree of clarity/foreseeability. These inconsistencies have not been incidental, but have recurred in the jurisprudence on numerous occasions. Yet, no reasons have been provided by the Ad Hoc Appeals Chambers in relating to their vacillating approaches. In these circumstances, appellants have not been in a position to envisage the outcome of appellate proceedings in relation to these issues with a reasonable degree of certainty. What is more, some appellants have had their appeals conducted and adjudicated in a substantially diverging manner in comparison with similarly situated appellants.

11. Appellate Judgments

11.1. Ad Hoc Tribunals and ICC

11.1.1. Reasoned Opinion

The RPE of the Ad Hoc Tribunals stipulate that an appellate judgment must "be accompanied or followed as soon as possible by a reasoned opinion in writing […]".[1976] Contrary to the first instance, a reasoned opinion in writing provided at the second instance does not enable a further right to appeal, considering that the Ad Hoc Tribunals operate a two-tier legal system. It, therefore, exclusively expresses the accused's right to be provided with reasons concerning determinative conclusions adopted in his or her criminal case.

However, the Ad Hoc Appeals Chambers have indicated that this aspect requires adjustment in the context of appeal proceedings. The ICTY Appeals Chamber has found that "[t]here is a significant difference from the standard of reasoning before a Trial Chamber".[1977] It has held that the ICTY Statute "does not require the Appeals Chamber to provide a reasoned opinion such as that required of the Trial Chamber" and that only the RPE call for a "reasoned opinion in writing".[1978] It has further considered that "[t]he purpose of a reasoned opinion under […] the Rules [of Procedure and Evidence] is not to provide access to all the deliberations of the Appeals Chamber in order to enable a review of its ultimate findings and conclusions".[1979] Therefore, pursuant to the jurisprudence of the ECtHR, "[t]he Appeals Chamber must indicate

[1976] Rule 117(B) ICTY RPE; Rule 118(B) ICTR RPE.
[1977] Kunarac et al., at 42. The ICTR Appeals Chamber explicitly adopted these standards soon thereafter. See: Rutaganda, at 19.
[1978] Kunarac et al., at 42.
[1979] Ibid., at 42.

with sufficient clarity the grounds on which a decision has been based", which "cannot be understood as requiring a detailed response to every argument".[1980]

It is, thus, unsurprising that judgments of the Ad Hoc Appeals Chambers frequently feature reasoning of a limited scope. The Appeals Chambers' assessments often constitute no more than bare conclusions without supporting analysis. For instance, in response to a ground of appeal that the Trial Chamber would have erred in finding a witness credible, the ICTY Appeals Chamber merely noted that the appellant failed to demonstrate that "the Trial Chamber erred in holding that this witness' account of the events […] was credible", "that its explanation was unreasonable", and "how the Trial Chamber's reliance upon [the] Witness [in question] and its conclusion with regard to the testimony of [a] Defence Witness […] were unreasonable".[1981] In a similar vein, the Appeals Chambers have often reiterated the relevant reasoning of the Trial Chamber and concluded, on this basis, that no error has been demonstrated. For instance, after reproducing the relevant findings of a Trial Chamber, the analysis of the ICTY Appeals Chamber was limited to a remark that the appellant "does not show that the Trial Chamber erred in relying on this evidence".[1982]

However, the reasoning underlying the Appeals Chambers' approach to a reasoned opinion has also incurred disapproval. A judge of the Appeals Chamber has noted that the Trial Chambers' Statutory obligation to provide a "reasoned opinion in writing" is reiterated in the RPE of the Ad Hoc Tribunals, which is transferrable, *mutatis mutandis,* to the Appeals Chambers.[1983] This assessment is further supported by the fact that the obligations in the RPE and the Statutes are worded identically. Accordingly, dissenting judges have criticised the lack of reasoning concerning particular findings made by the Ad Hoc Appeals Chambers.[1984]

With regard to the ICC, the ICC Statute appears to impose a lower obligation on the ICC Appeals Chamber vis-à-vis ICC Trial Chambers. Whereas a judgment of the ICC Appeals

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[1980] Ibid., at 42.
[1981] Naletilić & Martinović, at 416. Similar: Vasiljević, at 60; Kupreškić et al., at 370; Brđanin, at 72.
[1982] Milošević, at 153. Similar: Limaj et al., at 238-237, 240-241, 249-250, 252-253, 257-258, 260-261, 265, 272-273; Ntakirutimana & Ntakirutimana, at 275-276; Munyakazi, at 152-154; Blagojević & Jokić, at 55; Karera, at 127, 239.
[1983] Stanišić & Simatović, Separate and Partially Dissenting Opinion of Judge Carmel Agius, at 3 (footnote 13).
[1984] E.g., Stanišić & Simatović, Separate and Partially Dissenting Opinion of Judge Carmel Agius, at 3 (footnote 13), 10; Gotovina & Markač, Dissenting Opinion of Judge Fausto Pocar, at 14.

Chamber "shall state the reasons on which it is based",[1985] ICC Trial Chambers are obliged to provide "a full and reasoned statement of the […] findings on the evidence and conclusions".[1986] Indeed, the ICC Appeals Chamber has also limited the scope of the right to a reasoned opinion in the context of appellate proceedings, at least on particular occasions. Alike the Ad Hoc Appeals Chambers, it has offered bare conclusions without supporting analysis[1987] and reiterated the Trial Chamber's analysis without independent analysis.[1988]

11.1.2. Public Pronouncement

According to the RPE of the Ad Hoc Tribunals, an appellate judgment shall "be pronounced in public".[1989] The RPE further indicate that the pronouncement of the judgment and the delivery of a reasoned opinion may be separated, as an appellate judgment must "be accompanied or followed as soon as possible by a reasoned opinion in writing […]".[1990] Indeed, in the initial stages, the Ad Hoc Appeals Chambers delayed the production of a reasoned opinion in writing, after allowing or declining grounds of appeal at the oral hearing.[1991] Thereafter, however, the Appeals Chambers have generally proceeded to provide a reasoned opinion in writing, or at least a summary thereof, simultaneously with the pronouncement of the judgment on appeal. Finally, the RPE enshrine the accused's right to be present at the pronouncement of the appellate judgment,[1992] although they also specifically permit the Appeals Chambers to deliver their judgments in the absence of the accused.[1993]

In a similar fashion, the ICC Statute mandates that "[t]he judgement of the [ICC] Appeals Chamber […] shall be delivered in open court"[1994] and that it may be delivered in "the absence of the person acquitted or convicted".[1995]

[1985] Art. 83(4) ICC Statute.
[1986] Art. 74(5) ICC Statute.
[1987] E.g., Lubanga, at 351.
[1988] E.g., Lubanga, at 162-163, 427-430.
[1989] Rule 117(D) ICTY RPE; Rule 118(D) ICTR RPE.
[1990] Rule 117(B) ICTY RPE; Rule 118(B) ICTR RPE.
[1991] E.g., Aleksovski, at 4 (the Appeals Chamber further reserved its judgment on two of the prosecution's grounds of appeal); Serushago Sentencing Appeal, at 3; Kayishema & Ruzindana, at 2 (also: ibid., Annexe A, Procedure en Appel, at 31).
[1992] Rule 117(D) ICTY RPE; Rule 118(D) ICTR RPE.
[1993] Rule 118(B) ICTY RPE; Rule 119(B) ICTR RPE.
[1994] Art. 83(4) ICC Statute.
[1995] Art. 83(5) ICC Statute.

11.2. Evaluation

11.2.1. Reasoned Opinion

The relevant standard in international human rights law requires sufficient or meaningful consideration of the core issues before an appellate body.[1996] The general practice of the Ad Hoc Appeals Chambers and, arguably, the ICC Appeals Chamber, according to which a detailed response to every appellate argument is not required, complies with this norm.

However, whereas the ICC Appeals Chamber has not done so in its early jurisprudence, the Ad Hoc Appeals Chambers have, in certain judgments, failed to provide sufficient or meaningful consideration to determinative issues. This may be illustrated by the following example.[1997] When increasing a twenty year sentence to a sentence of life imprisonment, the ICTY Appeals Chamber limited its reasoning to a single operative sentence: the "crimes were characterized by exceptional brutality and cruelty, […] [the accused's] participation was systematic, prolonged and premeditated and he abused his senior position".[1998] It did not, however, indicate how it had established these characterisations or how they would specifically support the conclusion that the Trial Chamber had underestimated the gravity of the accused's conduct. Although it could be maintained that the replication of the relevant findings of the Trial Chamber provided the necessary reasoning, the ICTY Appeals Chamber, in fact, concluded that the former had not erred in adopting these findings or setting out the relevant law.[1999] As correctly noted by a dissenting judge, the reasoning was confined to "conclusory statements".[2000] Since the increased sentence was based on this assessment, more extensive reasoning was required, especially in view of its irreversible nature. Even so, considering the relatively infrequent occurrence of such violations, this does not detract from the conclusion that, in general, the Ad Hoc Appeals Chambers reason their judgments in accordance with the requirements established in international human rights law.

[1996] Part II, Chapter 6.2.4.
[1997] Also: e.g., Stanišić & Simatović, Separate and Partially Dissenting Opinion of Judge Carmel Agius, at 3.
[1998] Galić, at 455.
[1999] Ibid., at 455.
[2000] Ibid., Separate and Partially Dissenting Opinion of Judge Meron, at 13.

11.2.2. Public Pronouncement

International human rights law permits forms of publicity falling short of the public pronouncement of an appellate judgment.[2001] Nevertheless, the practice of the Appeals Chambers of the Ad Hoc Tribunals and the ICC is, arguably, in accordance with the most stringent interpretation of this guarantee in international human rights law. On the basis of their internal legal frameworks, the public pronouncement of an appellate judgment is a mandatory component of the appellate process and, in practice, the Appeals Chambers of the Ad Hoc Tribunals and the ICC have read out summaries of their judgments in public. In addition, the Appeals Chambers of the Ad Hoc Tribunals and the ICC have not resorted to *in absentia* pronouncements of their judgments hitherto.

[2001] Part II, Chapter 5.1.4.9.

CONCLUSION

The research question of this study, i.e. "*against which standards should the appellate proceedings of the Ad Hoc Tribunals and the ICC be assessed and have the Ad Hoc Tribunals and the ICC conducted and adjudicated appeals taken from first instance judgments and/or sentences in accordance with such standards?*", yields the following conclusion.

First, the appellate processes of the Ad Hoc Tribunals and/or the ICC comply or, at least, do not display non-compliance, with norms of international human rights law concerning appellate fairness for the most part.

In more specific terms, the following facets of the appellate proceedings of the Ad Hoc Tribunals and the ICC fall in line with such norms: (i) single-level appellate review; (ii) the general possibility of regulating the appellate process; (iii) the extension of the right to appeal to both the person convicted at first instance, including the possibility of waiving this right, and the Ad Hoc and ICC prosecutors; (iv) the right to a defence by means of legal assistance, which includes the possibility of being represented by counsel, the assignment of legal aid free of charge to the indigent, adequate legal assistance by counsel appointed under a legal aid scheme,[2002] and the selection of privately retained counsel of one's own choosing;[2003] (v) the right to a defence by means of self-representation;[2004] (vi) the requirement of superiority; (vii) the requirement of impartiality, which concerns, more specifically the general right to an impartial tribunal and, specifically regarding the ICC, the absence of impermissible accumulation of judicial functions in the pre-trial and appeal phases of the same case; (viii) the approaches to access to appellate review, which concern the "raise of waive" rule,[2005] a reasoned opinion by Trial Chambers, time limits, word limits, and, specifically regarding the ICC, the form of written submissions on appeal; (ix) the requirement of orality;[2006] (x) the requirement of presence; (xi) the scope of appellate review encompassing, on the one hand, the conviction and the sentence and, on the other hand, specifically regarding the ICC, questions of fact and law; (xii) the powers of the Appeals Chambers as regards both the

[2002] This matter has not specifically arisen in the appellate process of the ICC hitherto.
[2003] This matter has not specifically arisen in the appellate process of the ICC hitherto.
[2004] This matter has not specifically arisen in the appellate process of the ICC hitherto.
[2005] This matter has not specifically arisen in the appellate process of the ICC hitherto.
[2006] However, the ICC Appeals Chamber has found that this is not an obligation of international human rights law, which could potentially raise human rights related issues in future proceedings. See: Part III, Chapter 8.1.2.

aggravation and alteration of first instance sentences and convictions;[2007] (xiii) the right to a reasoned opinion;[2008] and (xiv) the public pronouncement of an appellate judgment.

Nevertheless, particular facets of the appellate processes of the Ad Hoc Tribunals fall short of the relevant yardsticks developed in international human rights law either as a result of outright non-compliance with the relevant norm or because of a transgression of the limits pertaining to the freedom to regulate the appellate process.

These facets concern: (i) the involvement of the same judges in pre-trial and appellate adjudication in the same case or in separate, but interrelated, appellate cases involving the same accused; (ii) the approach to access to appellate review in respect of the form of written submissions on appeal; (iii) the scope of appellate review regarding questions of fact based on the trial record and sentencing appeals; (iv) the power of the Appeals Chambers to substitute first instance acquittals in favour of unassailable convictions without the required safeguards; and (v) the powers of the Appeals Chambers regarding the standard of review to be applied and scope of evidence to be considered after finding an error of law, the resort to either conclusive appellate determination or remittal, and to prosecutorial appeals. However, this conclusion does not apply to the ICC. In the early jurisprudence of the ICC, such challenges have either not specifically appeared or not demonstrated sufficient indications as to a lack of compliance with norms of international human rights law concerning appellate fairness.

The following sections will identify the causes underlying the shortfalls of the appellate processes of the Ad Hoc Tribunals. Thereafter, proposals to repair these shortcomings[2009] will be put forward. These proposals are directed at the ICC only. The mandates of the Ad Hoc Tribunals have either drawn (in the case of the ICTR) or are drawing (in the case of the ICTY) to a close and, what is more, the MICT, which operates an appellate framework similar to the Ad Hoc Tribunals,[2010] has undertaken to ensure normative continuity with the appellate

[2007] These matters have not specifically arisen in the appellate process of the ICC hitherto.
[2008] Whereas the Ad Hoc Appeals Chambers have, on occasion, failed to provide a reasoned opinion in respect of determinative matters, this issue has not assumed a consistent character in the jurisprudence. See: Part III, Chapter 11.1.1. Accordingly, this aspect will not be assessed further.
[2009] As noted *supra*, in respect of certain matters, the practice of the Ad Hoc Tribunals has not been found to contravene international human rights law, but such matters have not arisen in the early jurisprudence of the ICC Appeals Chamber. In this regard, no specific proposals will be put forward, except that, as may be expected, the ICC Appeals Chamber emulate the approach of the Ad Hoc Appeals Chambers.
[2010] Art. 23 MICT Statute; Rules 131-145 MICT RPE.

practice of the Ad Hoc Tribunals.[2011] Far-reaching adjustments cannot be made in these circumstances. At the same time, whilst the shortcomings affecting the appellate procedures of the Ad Hoc Tribunals do not apply to the appellate framework or the emerging jurisprudence of the ICC, as such, they may materialise in future proceedings before the ICC Appeals Chamber. As with the Ad Hoc Tribunals, the appellate phase of the ICC's proceedings has been undertheorized in the preparatory work preceding the adoption of the ICC Statute,[2012] as a result of which the essential function of the ICC Appeals Chamber suffers from a degree of ambiguity. ICC appellate proceedings have, thus, been labelled as "perhaps the most clearly inquisitorial aspect of the Court's procedural regime", [2013] maintaining "more of a common law character",[2014] and displaying "extreme flexibility".[2015] In addition, the general similarity of its appellate procedure vis-à-vis the Ad Hoc Tribunals and/or, as developed *infra,* indications in the early jurisprudence of the ICC Appeals Chamber suggest the possibility of a comparable approach concerning certain shortcomings. The proposals are further limited in that recommended adjustments involving an overhaul of the entire configuration of international criminal justice (such as "a wholly new super-appellate jurisdiction that acts as the appeals court to all existing and future international criminal courts and tribunals"[2016]) or an extensive refashioning of the ICC's legal texts (such as "a second layer of appeal"[2017]) will not be contemplated. The practical focus of this study compels proposals confined to mechanisms within the existing legal framework of the ICC or, if necessary, calling for comparatively limited adjustments to the ICC's legal texts.

[2011] Ngirabatware, at 6.
[2012] Part III, Chapter 1.
[2013] K. Heller, 'The Rome Statute of the International Criminal Court', in K. Heller and M. Dubber (eds.), *The Handbook of Comparative Criminal Law* 593 (Stanford: Stanford Law Books, 2011), at 600.
[2014] G. Boas, J. Bischoff, N. Reid, and B. Don Taylor III, *International Criminal Law Practitioner Library: International Criminal Procedure* (Volume 3) (Cambridge: Cambridge University Press, 2011), at 424.
[2015] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1539.
[2016] G. Boas, 'The Case for a New Appellate Jurisdiction for International Criminal Law', in G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* 417 (London: Cameron May International Law & Policy, 2009), at 420-421. Similar: G. Boas, J. Jackson, B. Roche, and D. Taylor III, 'Appeals, Reviews, and Reconsideration', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 939 (Oxford: Oxford University Press, 2013), at 1013-1014.
[2017] L. Carter, 'The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal', in G. Venturini and S. Bariatti (eds.), *Liber Fausto Pocar: Individual Rights and International Justice* 125 (Milano: Giuffre Editore, 2009), at 142.

1. The Shortfalls Explained

As discussed, the design of the appellate phase of international criminal trials has been characterised by a general lack of rigour.[2018] Whereas the state of international human rights law evolved significantly after the preparatory work relevant to the Ad Hoc Tribunals had concluded,[2019] certain facets of the right to appeal (most notably the possibility of a final appellate conviction revoking an acquittal and the scope of appellate review) were squarely raised and, yet, sufficiently well-defined resolutions were not supplied.[2020] Furthermore, notwithstanding generic references to the right to appeal,[2021] other aspects of the right to appeal or relevant facets of the right to a fair trial have been invoked highly infrequently in the jurisprudence of the Ad Hoc Tribunals. In these circumstances, norms of international human rights law concerning appellate fairness have been undervalued.

Indeed, certain facets of the appellate processes of the Ad Hoc Tribunals have mainly been developed out of practical considerations without (sufficient) regard for applicable norms of international human rights law. In relation to the rotation principle, it has been noted that "nearly all the judges wished to be appointed to the appeals chamber, which was viewed to be the more prestigious assignment" and that, "[a]s a compromise, the judges agreed that assignments would be for an initial period of one year and subject to 'rotat[ion] on a regular basis' thereafter".[2022] In this regard, an Expert Group has recommended "a permanent separation […] between both ICTY and ICTR Trial and Appeals Chambers […] to […] [overcome] disqualification problems".[2023] In response, the ICTY and the ICTR relaxed the distinction between pre-trial judges and trial judges and left the possibility of involvement of the same judge in pre-trial and appeal proceedings in the same case unaffected, in order to provide for more flexibility in the composition of the Chambers.[2024] Even so, the international

[2018] Part III, Chapter 1.1.
[2019] Part II.
[2020] Part III, Chapter 1.1.
[2021] Part III, Chapter 1.1; Part III, Chapter 2.1.1.
[2022] M. Scharf, 'A Critique of the Yugoslavia War Crimes Tribunal', 25(2) *Denver Journal of International Law & Policy* 305 (1996-1997), at 308.
[2023] Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634, 22 November 1999, at 106.
[2024] U.N. Secretary-General, Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/56/853, 4 March 2002, at 15, 69.

human rights law implications of this approach were not considered.[2025] Similarly, Judge Shahabuddeen has held that irrevocable appellate convictions in lieu of first instance acquittals are, *inter alia,* a necessary corollary of the lack of a third level within the judicial system of the Ad Hoc Tribunals.[2026] An early warning sounded by two judges, who urged "the [ICTR] Appeals Chamber to thoroughly examine the issue of entering new convictions at appellate level which, at this stage, can no longer be appealed"[2027] has never been heeded, in view of the fact that the Ad Hoc Tribunals only provided a justification based on internal law for such powers without reference to international human rights law.[2028] Finally, regarding the approach to access to appellate review in respect of the form of written submissions on appeal, the aforementioned Expert Group suggested, in anticipation of "a significant increase in the number of appeals", that the Ad Hoc Appeals Chambers, *inter alia,* "consider motions for summary dismissal in cases where it clearly appears that the appeal is frivolous", which may be "considered expeditiously".[2029] The ICTY agreed with this recommendation,[2030] without mention of international human rights law exigencies.

What is more, the amorphous role of the Ad Hoc Appeals Chambers has created an unstable basis for the orderly development of the appellate process. It has been maintained that "the [ICTY] Statute visualised an appellate process as understood in adversarial systems",[2031] that the interplay between Common Law and Civil Law stretches into the appellate proceedings of the Ad Hoc Tribunals,[2032] but also that the Ad Hoc Appeals Chambers are unique.[2033] Such a lack of clarity has affected the appellate process in two primary manners.

[2025] M. Scharf, 'A Critique of the Yugoslavia War Crimes Tribunal', 25(2) *Denver Journal of International Law & Policy* 305 (1996-1997), at 308; S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), at 178–179; V. Tochilovsky, 'Special Commentary: International Criminal Justice – Some Flaws and Misperceptions', 22(4) *Criminal Law Forum* 593 (2011), at 606-607.
[2026] Rutaganda, Separate Opinion of Judge Shahabuddeen, at 30-35.
[2027] Rutaganda, Separate Opinion of Judges Meron and Jorda, at p. 1.
[2028] Part III, Chapter 10.1.4.1.
[2029] U.N. Secretary-General, Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/54/634, 22 November 1999, at 103.
[2030] U.N. Secretary-General, Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/56/853, 4 March 2002, at 67. While the ICTY referred to this recommendation in the context of the right to appeal against preliminary motions and interlocutory appeals subject to leave to appeal, both Ad Hoc Tribunals have extensively applied the mechanism of summary dismissal in relation to appeals from convictions and/or sentences too. Part III, Chapter 7.1.5.
[2031] Kvočka et al., Separate Opinion of Judge Shahabuddeen, at 3.
[2032] E.g., UNICRI, ADC ICTY, and OSCE ODIHR, *Manual on International Criminal Defence - ADC-ICTY Developed Practices* (Turin: UNICRI Publisher, 2011), at 175; A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the

As discussed, applications for appellate review are not decided by the full benches of the Appeals Chambers, but by benches composed of five out of a total of seven judges sitting in the Appeals Chambers.[2034] Depending on the composition of a bench in a particular appeal, different majorities may be formed, which may conflict with each other on particular issues.[2035] Indeed, the shifting compositions of the Ad Hoc Appeals Chambers have generated diverging approaches to the review of questions of fact based on the trial record and the regulation of certain powers of the Appeals Chambers. Thus, particular benches have emphasised a Civil Law style approach in respect of these matters. This is reflected in the current of "broad" appellate review of questions of fact based on the trial record as well as a comprehensive interpretation of the powers of the Appeals Chambers concerning the application of an autonomous review standard and/or assessment of evidence not directly invoked by Trial Chambers in relation to an error of law.[2036] Other benches have displayed an inclination towards a Common Law approach to appellate review in respect of these issues. This is revealed by the strand of jurisprudence characterised by "narrow" appellate review of questions of fact based on the trial record as well as a predilection for a more confined take on aspects of the powers of the Ad Hoc Appeals Chambers, i.e. a deferential review standard and/or consideration of evidence relied on by Trial Chambers regarding an error of law.[2037]

Furthermore, the combination of elements drawn from Civil Law and Common Law in international criminal procedure may, in and of itself, entail pitfalls concerning standards of international human rights law. It has been remarked that "there is a risk that by adopting a 'pick and mix' approach, international courts and tribunals end up with a system that contains

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ICC', in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court: a Commentary* 1439 (Oxford: Oxford University Press, 2002) at 1490-1491.

[2033] C. Jorda and M. Saracco, 'Le Rôle de la Chambre d'Appel du Tribunal Pénal International pour l'Ex-Yougoslavie et pour le Rwanda', in J.-P. Marguénaud, M. Massé, and N. Poulet-Gibot Leclerc (eds.), *Apprendre à Douter: Questions de Droit, Questions sur le Droit, Études Offertes à Claude Lombois* 583 (Limoges: Presses Universitaires de Limoges, 2004, at 587. Similar: L. Carter, 'The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal', in G. Venturini and S. Bariatti (eds.), *Liber Fausto Pocar: Individual Rights and International Justice* 125 (Milano: Giuffre Editore, 2009), at 139-140.

[2034] Part III, Chapter 6.1.

[2035] Two judges of the ICTY Appeals Chamber have warned that "[i]t should not happen that due to shifting majorities the Appeals Chamber changes its jurisprudence from case to case". See: Kordić & Čerkez, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, at 13.

[2036] Part III, Chapter 9.1.1.2.1.3; Part III, Chapter 9.1.1.1.

[2037] Ibid.

none of the checks and balances that bring order to a national system, instead ending up with a Frankenstein's monster that fails to adequately protect the rights of the defence".[2038]

Indeed, such tendencies are clearly recognisable in international appellate proceedings with regard to final appellate reversals of acquittals, including the concomitant powers of the Ad Hoc Appeals Chambers, and the resort to either conclusive appellate determination or remittal. Commencing with the former, the rejection of prosecutorial appeals against acquittals in Common Law has been said to arise, *inter alia,* out of the need to protect the right to trial by jury.[2039] A reversal by judges would undermine the right to be tried by one's peers, a fundamental notion of Common Law systems of criminal procedure. It is, then, claimed that this rationale does not find application in international criminal law, considering that there are no jury trials and that the proceedings are conducted by professional judges.[2040] However, a simple resort, by process of elimination, to the Civil Law position fails to appreciate an essential safeguard. In comparison with Common Law systems, most Civil Law systems involve a continuous decision-making process, which entails that the establishment of facts persists throughout first instance and appellate proceedings.[2041] The more extensive assessment of facts on appeal establishes a more solid foundation for appellate reversals and generally allows the person concerned to additionally challenge the factual basis for a possible conviction. Be that as it may, the Appeals Chambers of the Ad Hoc Tribunals and the ICC operate, in the main, a corrective procedure, focusing on errors that the Trial Chambers may have committed,[2042] which more closely resembles the appellate procedures of Common Law systems. Thus, even though international appellate proceedings incorporate the logic behind prosecutorial appeals against acquittals from Civil Law, they discount a vital safety device by reducing appellate review to a corrective appraisal borrowed from Common Law.

[2038] R. Skilbeck, 'Frankenstein's Monster: Creating a New International Procedure', 8(2) *Journal of International Criminal Justice* 451 (2010), at 452. Similar: M. Fairlie, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit', 4(3) *International Criminal Law Review* 243 (2004), at 292; P. Robinson, 'Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY', 3(5) *Journal of International Criminal Justice* 1037 (2005), at 1040. Also: P. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court', 5(1) *Washington University Journal of Law and Policy* 87 (2001), at 90-91; E. O'Sullivan and D. Montgomery, 'The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY', 8(2) *Journal of International Criminal Justice* 511 (2010), at 513.
[2039] G. Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* 104 (Oxford: Oxford University Press, 2009), at 108. Also: Part I, Chapter 6.
[2040] Ibid., at 108.
[2041] Ibid., at 109. Also: Part I, Chapter 6.
[2042] Part III, Chapter 9.1; Part III, Chapter 9.2.

Such uncertainty has, arguably, also incurred a vacillating application of the corresponding powers of the Ad Hoc Appeals Chambers concerning prosecutorial appeals. The powers of the Ad Hoc Appeals Chamber to conclusively settle an appeal or to remit, amount to a wider variation of the approach to final appellate reversal of acquittals and, therefore, a similar observation applies. The Ad Hoc Appeals Chambers have overwhelmingly resorted to instantaneous appellate resolution instead of remittal, which is, overall, closer to the Civil Law approach to appellate review,[2043] whilst the use of such powers is combined with a (predominantly) corrective approach to appellate review, which is more encountered in Common Law systems.[2044] These features of the appellate processes of the Common Law and Civil Law systems stand in close relationship to each other. Instantaneous appellate resolution in Civil Law systems of appellate review is connected to the continuous decision-making process, which provides the necessary basis for the exercise of such powers by extensively testing the factual foundation of a judgment. The opposite tendency appears in Common Law systems, since the restrained approach to questions of fact warrants a more cautious exercise of appellate powers and, thus, prioritises remittal. This balance is lacking in the appellate proceedings of the Ad Hoc Tribunals, since the preference for instantaneous appellate resolution is not accompanied by a continuous decision-making process.

2. Proposals

2.1. Recusal

Whereas the ICC's legal texts explicitly exclude the involvement of the same judge in the pre-trial and appeal phases in the same case,[2045] ICC appeal judges could, in theory, partake in separate appellate cases affecting the same person. For instance, the ICC Appeals Chamber has determined that the Lubanga Trial Chamber had not erred in finding that Ntaganda, one of Lubanga's alleged henchmen, had made use of children under the age of fifteen years as body guards,[2046] which may amount to the war crime of "using them to participate actively in hostilities".[2047] However, at the time, first instance proceedings regarding the same (and

[2043] Part III, Chapter 10.1.1; Part III, Chapter 10.1.2.
[2044] Part III, Chapter 9.1.
[2045] Regulation 12 ICC Regulations of the Court. Accordingly, no issues of international human rights law arise in respect of this matter.
[2046] Lubanga, at 396, 400, 405.
[2047] Art. 8(2)(b)(xxvi), 8(2)(e)(vii) ICC Statute.

related) charges were being conducted against Ntaganda himself.[2048] If Ntaganda were to be found guilty on these charges and were to subsequently file an appeal, it is possible that some of the judges sitting on the Lubanga Appeals Chamber will also take part in the appellate proceedings in Ntaganda, since the composition of the ICC Appeals Chamber is largely fixed.

The ICC, arguably, possesses the legal tools to prevent such intersecting appellate assessments. The ICC Statute demands the recusal of judges whose "impartiality might reasonably be doubted *on any ground*",[2049] which is broad enough to accommodate applications for disqualification concerning the same judge pronouncing on the criminal responsibility of a person in an interrelated case and sitting on the appeal concerning the first instance judgment of the same person, as demanded by international human rights law. Where such applications are granted, the ICC Presidency retains the required flexibility, as it may temporarily appoint another judge to the Appeals Chamber.[2050]

2.2. Screening Mechanism

The variation in the approach to the form of written submissions on appeal of the ICC Appeals Chamber in its early jurisprudence is too limited to consider it to exceed the limits of the discretion to regulate the appellate process recognised under international human rights law.[2051] Yet, as its jurisprudence matures, such fluctuation may come to approximate the degree of imprecision or lack of foreseeability encountered at the Ad Hoc Tribunals.

It has been proposed, in the context of the Ad Hoc Tribunals, to introduce a division of the Appeals Chambers charged with screening the admissibility of written arguments presented on appeal.[2052] Such a screening mechanism may ensure a more consistent approach to the concept of summary dismissal and streamline the ensuing appellate process of the ICC. It would, thus, ensure that defective arguments are more consistently identified and adjudged, while seeing to it that the ICC Appeals Chamber may concentrate on *prima facie* meritorious

[2048] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, ICC, Pre-Trial Chamber II, 09 June 2014, at 83-96.
[2049] Art. 41(2)(a) ICC Statute (emphasis supplied).
[2050] Regulation 12 ICC Regulations of the Court.
[2051] Part III, Chapter 7.1.5.
[2052] C. Jorda and M. Saracco, 'Le Rôle de la Chambre d'Appel du Tribunal Pénal International pour l'Ex-Yougoslavie et pour le Rwanda', in J.-P. Marguénaud, M. Massé, and N. Poulet-Gibot Leclerc (eds.), *Apprendre à Douter: Questions de Droit, Questions sur le Droit, Études Offertes à Claude Lombois* 583 (Limoges: Presses Universitaires de Limoges, 2004, at 602. Also: M. Drumbl and K. Gallant, 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases', 3(2) *The Journal of Appellate Practice and Process* 589 (2001), at 603.

claims. The ICC Statute could accommodate such a mechanism under the single judge provision, which allows "[t]he functions of the Pre-Trial Chamber […] [to] be carried out […] by a single judge" with respect to particular decisions[2053] and may be invoked by the ICC Appeals Chamber.[2054] This avenue does not usurp the primary function of the Appeals Chamber, i.e. the delivery of an appellate judgment. However, if this option is not viable, considering that the ICC Statute expressly requires that "[t]he Appeals Chamber shall be composed of all the judges of the Appeals Division"[2055] and the RPE are of a subordinate nature[2056], a corresponding amendment to the legal texts could be introduced.[2057]

2.3. Broad Appellate Review

The inconsistency marking the appellate jurisprudence of the Ad Hoc Tribunals in respect of the scope of review regarding questions of fact based on the trial record and sentencing appeals, as well as the scope of review to be applied and type of evidence to be considered in connection with a finding that an error of law has been committed, may also make inroads into the corresponding approaches of the ICC in future proceedings. As discussed, there have been pleas for a wider approach to appellate review in the early jurisprudence of the ICC.[2058] In addition, the relatively short mandates of ICC judges[2059] occasion altering formations of the Appeals Chamber, which may lead to alternating takes on appellate review.

In this regard, calls for a narrowing of the scope of appellate review have been put forward.[2060] However, it is submitted that the opposite outcome is to be preferred. More specifically, the ICC Appeals Chamber should recognise that the ICC Statute permits a widened approach to appellate review, which entails: (i) a decreased degree of deference to Trial Chambers in favour of the competence of the ICC Appeals Chamber to review factual matters in general and sentencing appeals;[2061] and (ii) an interpretation of the "trial record" as

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[2053] Art. 39(2)(b)(iii) ICC Statute; Rule 7 ICC RPE.
[2054] Rule 149 ICC RPE.
[2055] Art. 39(2)(b)(i) ICC Statute.
[2056] Art. 51(4), (5) ICC Statute.
[2057] Art. 51(2) ICC Statute; Rule 3 ICC RPE.
[2058] Lubanga, Dissenting Opinion of Judge Anita Ušacka.
[2059] Art. 36(9) ICC Statute.
[2060] S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), at 179; S. Jayawardane and C. Divin, 'The Gotovina, Perišić and Šainović Appeal Judgments: Implications for International Criminal Justice Mechanisms', *Policy Brief 13 The Hague Institute for Global Justice*, September 2014, at 8.
[2061] Similar in respect of questions of fact based on additional evidence: L. Carter, 'The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of

extending beyond the evidence considered in the trial judgment and encompassing the entire body of evidence admitted in the course of preceding proceedings.[2062] Two reasons militate in favour of such an expansion.

First, the proposed approach to appellate review possesses a stronger basis in the primary legal texts of the ICC and the tools available to the ICC Appeals Chamber. A narrow approach to appellate review reads the grounds of appeal too restrictively. The fact that the jurisdiction of the ICC Appeals Chamber is limited to various types of errors does not, as such, entail a rejection of a widened approach. As expressed by an ECtHR judge, "[l]egal issues cannot easily be separated from factual considerations", since "the choice of the norm […] in relation to which the fact pattern is to be considered clearly determines which facts are going to be considered as legally relevant and which are not".[2063] Indeed, the Ad Hoc Appeals Chambers have struggled with this distinction, since they have, for instance, defined an extra-Statutory category of "a mixed error of law and fact",[2064] adjudicated allegations of errors of law and errors of fact simultaneously,[2065] and omitted to specify the type of error.[2066] A widened approach, on the contrary, recognises the inherent interplay between these matters and explicitly recognises the mandate of the ICC Appeals Chamber to engage with questions of fact to an appropriate degree. What is more, as discussed,[2067] the ICC Appeals Chamber is explicitly empowered to "call evidence to determine" a factual issue[2068] and, since it has "all the powers of the Trial Chamber",[2069] it may, *inter alia,* "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties"[2070] and request "the submission of all evidence that it considers necessary for the

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Admitting Evidence on Appeal', in G. Venturini and S. Bariatti (eds.), *Liber Fausto Pocar: Individual Rights and International Justice* 125 (Milano: Giuffre Editore, 2009), at 142.
[2062] Rule 151(1) ICC RPE.
[2063] Judgment, *Hermi v. Italy*, Application No. 18114/02, ECtHR, 18 October 2006, Dissenting Opinion of Judge Zupančič. Similar: X. Tracol, 'The Appeals Chambers of the International Criminal Tribunals', 12(2) *Criminal Law Forum* 137 (2001), at 146.
[2064] Strugar, at 252, 269.
[2065] E.g., Limaj et al., at 159, 222, 278, 318; Kajelijeli, at 29, 158-160, 182. Similar: Zigiranyirazo, at 51, 73; Blagojević & Jokić, at 300-303; Kalimanzira, at 186; Renzaho, at 319-320.
[2066] E.g., Gotovina & Markač, at 61 (also: Gotovina & Markač, Dissenting Opinion of Judge Carmel Agius, at 6; Gotovina & Markač, Dissenting Opinion of Judge Fausto Pocar, at 10); Tadić, at 183; Delalić et al., at 442-454, 459; Kordić & Čerkez, at 355-360; Orić, at 47; Šainović et al., at 550; Mrkšić & Šljivančanin, at 61-62; Aleksovski, at 64.
[2067] Part III, Chapter 10.2.2.3.
[2068] Art. 83(2) ICC Statute.
[2069] Art. 83(1) ICC Statute.
[2070] Art. 64(6)(d) ICC Statute.

determination of the truth".[2071] In addition, seeing that audio-visual recordings are made of ICC hearings, the typical distinction between trial and appeal judges does not apply in full. That is, ICC appellate judges are not insulated from witness testimony as the testimony of witnesses may be reread and replayed.[2072] It may be held, in opposition, that review of a recording is not the same as observing a witness on the stand. However, this advantage is not as pronounced in international criminal law as it may be in national proceedings. ICC judges hail from all over the world and are confronted with alleged crimes committed in foreign countries. The witnesses testifying to these events often speak a different language and have distinct cultural traditions and habits, which diminishes the ability of ICC trial judges to accurately assess the demeanour of witnesses to determine the veracity of their claims. Whereas a narrow approach to appellate review ignores these powers and tools, a widened approach embraces them as a necessary component of the ICC Appeals Chamber's jurisdiction. In relation to sentencing appeals, the language of the Rome Statute suggests a broader type of review than for appeals from the merits of a trial judgment. The latter must be based on specific errors and, on this basis, the ICC Appeals Chamber has determined that its scope of appellate review is of a limited reach.[2073] On the contrary, appeals from a sentence may be taken pursuant to a general claim on the "disproportion between the crime and the sentence",[2074] which, in the absence of a reference to the need to establish an error, suggests that the scope of appellate review concerning such matters must be construed broadly. Indeed, commentators have noted that the ICC Appeals Chamber has been afforded *"full jurisdiction* rather than 'arbitrary' powers" in sentencing appeals.[2075]

Secondly, a widened approach to appellate review is more attuned to two fundamental characteristics of ICC proceedings. The ICC deals with extremely serious allegations in a legal vacuum. The possibility of an incorrect evaluation is not balanced by the possibility of recourse to a third appellate level or an external mechanism.[2076] Furthermore, the discovery of

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[2071] Art. 69(3) ICC Statute.
[2072] The Ad Hoc Appeals Chambers have relied on audio-visual recordings to a limited extent. See: e.g., Delalić et al., at 620-650. However, overall, they have been reluctant to engage in such review. See: e.g., Hadžihasanović & Kubura, at 79; Nizeyimana, at 177.
[2073] Part III, Chapter 9.2.1.
[2074] Art. 81(2)(a) ICC Statute.
[2075] R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1545 (emphasis in original).
[2076] U. Lundqvist, 'Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks', 15(3) *Leiden Journal of International Law* 641 (2002), at 643-644.

the material truth must be considered a paramount interest,[2077] in light of the wider aims ascribed to international criminal law.[2078] It is, thus, essential that relevant factual issues are, to the extent possible, explored sufficiently based on a widened approach.

Opponents may argue that this proposal amounts to *de novo* review on appeal. This is not the case. A widened scope of appellate review does not entail a full rerun of the proceedings conducted at first instance. It involves a circumscribed broadening of appellate review, whilst adhering to the confines of the recognised grounds of appeal. It is, therefore, also limited to alleged errors committed by the Trial Chamber, but ensures that factual issues are appropriately scrutinised within such constraints. It may also be advanced that this approach to appellate review unduly prolongs proceedings generally marred by excessive delays. Such delays need not occur. The aforementioned screening mechanism would serve to weed out defective appellate arguments, which could streamline the appellate process and allow for more in-depth consideration of the merits of factual elements.

2.4. Conclusive Appellate Determination

Neither the legal texts of the ICC nor the early jurisprudence of the ICC formulate clear rules as to when the ICC Appeals Chamber is to conclusively determine a matter arising on appeal and when it is to remit an issue to the Trial Chamber, either in relation to questions of fact arising out of the trial record, additional evidence presented on appeal, or following a finding that an error of law has been committed.[2079] The development of an approach that avoids a lack of precision or foreseeability to an unreasonable degree is, thus, of paramount import.

In the literature, a clear preference for remittal exists in particular circumstances. For instance, it has been written that, if "there is no need to determine **additional facts** […], it may be appropriate for the [ICC] Appeals Chamber itself to amend the Trial Chamber's Judgement" but, if "the final verdict depends only on one or more narrow issues of fact, it may be appropriate […] [to] either to call evidence itself or to remand those issues of fact back to the Trial Chamber" and, "if wide-ranging new fact-finding is necessary, a new trial may be more

[2077] Part I, Chapter 1.1; Part I, Chapter 5.2.2.2.
[2078] J. Ohlin, 'Goals of International Criminal Justice and International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 55 (Oxford: Oxford University Press, 2013), at 55-68.
[2079] Part III, Chapter 9.2.1.2; Part III, Chapter 9.2.1.3; Part III, Chapter 10.2.2.2. Also: R. Roth and M. Henzelin, 'The Appeal Procedure of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* 1535 (Oxford: Oxford University Press, 2002), at 1556.

appropriate".[2080] Such an approach should be rejected. Pursuant to this logic, the approach of the ICC Appeals Chamber is contingent on the qualification of the matter at stake as either a question of law or fact. However, as discussed above, this distinction is too elusive to determine the appropriate course of action. In addition, the remittal of particular issues of fact and, especially, a new trial is likely to significantly protract proceedings, which may even run counter to the right to be tried without undue delay.[2081]

It is, accordingly, proposed that, in conjunction with the aforementioned widening of the scope of appellate review concerning questions of fact, the ICC Appeals Chamber should, in principle, conclusively determine matters on appeal.[2082] Such a construction appropriately balances the need to allow a first instance conviction and/or sentence to be challenged and the need to bring litigation to an end pursuant to the principle of finality. Nevertheless, such a power is limited by the rights of the accused. Indeed, this restriction has, in part, been recognised by the Ad Hoc Appeals Chambers concerning their powers to revise a first instance judgment. In this regard, it has been found that the basis for the revision of legal aspects of trial judgments should be pleaded adequately and/or sufficiently litigated on appeal.[2083] This falls in line with the right to "be informed promptly […] and in detail […] of the nature and cause of the accusation" under international human rights law, although this right extends to amendments of the factual basis too.[2084] In such circumstances, appellate proceedings would effectively be transformed into (partial) first instance proceedings without the essential safeguard of appellate recourse. Accordingly, where the ICC Appeals Chamber deems that the exercise of its power to "amend" amounts to a requalification of facts in legal terms or the adoption of a new finding of fact in a manner to contravene the aforementioned right to the accused, conclusive determination should yield to remittal to a Trial Chamber.

[2080] C. Staker and F. Eckelmans, 'Article 83', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* 1965 (München: Verlag C.H. Beck, 2016), at 1969 (emphasis in original). Also: L. O'Neill and G. Sluiter, 'The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia', 10(2) *Melbourne Journal of International Law* 596 (2009), at 626; G. Boas, J. Jackson, B. Roche, and D. Taylor III, 'Appeals, Reviews, and Reconsideration', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 939 (Oxford: Oxford University Press, 2013), at 1013.
[2081] W. Jordash, 'Guest Post: Merry-Go-Round Justice – The Retrial of Stanišić and Simatović', *Opinio Juris Blog*, 4 January 2016, available at: http://opiniojuris.org/2016/01/04/guest-post-merry-go-round-justice-the-retrial-of-stanisic-and-simatovic/.
[2082] Similar in respect of questions of fact based on additional evidence: L. Carter, 'The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal', in G. Venturini and S. Bariatti (eds.), *Liber Fausto Pocar: Individual Rights and International Justice* 125 (Milano: Giuffre Editore, 2009), at 142.
[2083] Part III, Chapter 10.1.1.3.
[2084] Part II, Chapter 5.1.4.5.

This proposal may be implemented by analogy to the procedure concerning the prerogative of the Trial Chamber to requalify facts in legal terms. Such a prerogative is curbed by similar limitations, seeing that it must, *inter alia,* be ensured that it does not exceed "the facts and circumstances described in the charges and any amendments to the charges".[2085] Accordingly, it must be accompanied by "notice to the participants of such a possibility" and the provision of "the opportunity to make oral or written submissions" to the participants.[2086] Considering that the Appeals Chamber may, pursuant to its authority to invoke the powers of the Trial Chamber,[2087] "[r]ule on any […] relevant matters" [2088] and "adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings",[2089] it may adopt comparable safeguards. Thus, where the ICC Appeals Chamber deems, after consulting the parties, that the conclusive determination of a question may contravene the right "[t]o be informed promptly and in detail of the nature, cause and content of the charge",[2090] it should remit the case to a Trial Chamber for renewed adjudication.

2.5. Final Appellate Convictions Accompanied by Safeguards

The ICC Appeals Chamber has, hitherto, not converted first instance acquittals into irrevocable convictions, but it has expressly indicated that it may do so, which comports with a plain reading of the relevant provisions of the ICC Statute.[2091]

In this regard, it has been suggested that the ICC Appeals Chamber should "be required to remit the case to the judges of first instance".[2092] However, as discussed, the power to enter an

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[2085] Regulation 55(1) ICC Regulations of the Court. The practical application of this Regulation has engendered substantial controversy. See: Judgment Pursuant to Article 74 of the Statute, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, ICC, Trial Chamber II, 7 March 2014, Minority Opinion of Judge Christine Van den Wyngaert, at 9-132. However, it is not inherently contradictory to international human rights law, seeing that the requalification of subordinate courts' judgments by appellate courts have not been rejected by human rights courts and monitoring bodies, provided that fair trial rights are adhered to. See: Part II, Chapter 5.1.4.5. Also: Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court', *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 8 December 2009, at 85.
[2086] Regulation 55(2) ICC Regulations of the Court.
[2087] Art. 83(1) ICC Statute.
[2088] Art. 64(6)(f) ICC Statute.
[2089] Art. 64(3)(a) ICC Statute.
[2090] Art. 67(1)(a) ICC Statute.
[2091] Part III, Chapter 10.2.5.
[2092] G. Boas, J. Jackson, B. Roche, and D. Taylor III, 'Appeals, Reviews, and Reconsideration', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules*

unassailable conviction for the first time on appeal is not contrary to the general corpus of international human rights law[2093] and, what is more, conclusive determination on appeal is to be prioritised over remittal.[2094] Furthermore, a model has been proposed, "whereby the Appeals Chamber would be empowered […] to modify findings of law and fact […] but would not be able to change the substantive decision".[2095] This model would subvert the essential function of the ICC Appeals Chamber to comprehensively and finally determine the question of guilt or innocence of the person concerned.[2096] Finally, the need for a "unanimous" decision has been put forward to justify such a conviction.[2097] This requirement has the unattractive corollary of distinguishing between appellate proceedings against conviction, which require a regular majority,[2098] and would risk paralysing the ICC Appeals Chamber in the event that the judges are unable to reach an agreement.

It is, therefore, proposed to, as discussed, fully recognise the statutory power of the ICC Appeals Chamber to impose a non-appealable conviction in lieu of a first instance acquittal,[2099] whilst giving effect to the safeguards demanded by international human rights law.[2100] Such an approach would, arguably, also thwart an inconsistent application of the powers of the ICC Appeals Chamber in respect of prosecutorial appeals.[2101]

The following procedure may be envisaged in this respect. As with the previous matter, on the basis of the authority of ICC Trial Chambers to engage in legal recharacterisation, the ICC could provide notice to the parties of the possibility of a reversal and seek their input on this matter, pursuant to its powers to "[r]ule on any […] relevant matters"[2102] and "adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the

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939 (Oxford: Oxford University Press, 2013), at 1013. This solution has occasionally been applied by the Ad Hoc Tribunals too. See: Part III, Chapter 10.1.4.2.
[2093] Part II, Chapter 6.2.2.
[2094] Conclusion, Chapter 2.4.
[2095] G. Boas, J. Jackson, B. Roche, and D. Taylor III, 'Appeals, Reviews, and Reconsideration', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 939 (Oxford: Oxford University Press, 2013), at 1013. This solution has occasionally been applied by the Ad Hoc Tribunals too. See: Part III , Chapter 10.1.4.2.
[2096] Similar: Šainović et al., Opinion Dissidente du Juge Ramaroson, at 8.
[2097] G. Boas, J. Jackson, B. Roche, and D. Taylor III, 'Appeals, Reviews, and Reconsideration', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappalà (eds.), *International Criminal Procedure - Principles and Rules* 939 (Oxford: Oxford University Press, 2013), at 1013.
[2098] Art. 83(4) ICC Statute.
[2099] Part III, Chapter 10.2.5.
[2100] Part II, Chapter 6.2.2.
[2101] Part III, Chapter 10.2.5.
[2102] Arts. 64(6)(f), 83(1) ICC Statute.

proceedings"[2103]. Subsequently, it may implement the relevant safeguards by reference to its wide-ranging powers. The accused's right "[t]o be informed promptly and in detail of the nature, cause and content of the charge"[2104] requires the ICC Appeals Chamber to ensure that reversals of first instance convictions are not imposed without sufficient notice provided to the accused and that they are not based on elements extrinsic to the original charges. Where this requirement is not met, the ICC Appeals Chamber must, as indicated previously, remit the matter to a Trial Chamber.[2105] If this threshold is met, oral hearings must be conducted to ensure that decisive issues have been sufficiently explored to justify a possible reversal, on the basis of any of the aforementioned prerogatives to "call evidence to determine" a factual issue,[2106] "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties",[2107] or request "the submission of all evidence that it considers necessary for the determination of the truth".[2108]

[2103] Arts. 64(3)(a), 83(1) ICC Statute.
[2104] Art. 67(1)(a) ICC Statute.
[2105] Conclusion, Chapter 2.4.
[2106] Art. 83(2) ICC Statute.
[2107] Arts. 64(6)(d), 83(1) ICC Statute.
[2108] Arts. 69(3), 83(1) ICC Statute.

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- Judgment, *Prosecutor v. Bizimungu*, Case No. ICTR-00-56B-A, ICTR, Appeals Chamber, 30 June 2014.
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- Judgment, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-A, ICTR, Appeals Chamber, 16 November 2009.

4.2.2. Other Judgments, Decisions, and Orders

- Decision on Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, ICTR, Appeals Chamber, 5 December 2006.
- Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. IT-98-44C-T, ICTR, Trial Chamber, 31 January 2007.
- Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, ICTR, Appeals Chamber, 3 November 1999.
- Decision, *Semanza v. Prosecutor*, Case No. ICTR-97-23-A, ICTR, Appeals Chamber, 1 June 2000.
- Order for Further Submissions and Severance, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-A, ICTR, Appeals Chamber, 7 February 2014.

4.3. International Residual Mechanism for Criminal Tribunals

- Judgment, *Prosecutor v. Ngirabatware,* Case No. MICT-12-29-A, MICT, Appeals Chamber, 18 December 2014.

4.4. International Criminal Court

4.4.1. Judgments Appeals Chamber

- Judgment, *Prosecutor v. Lubanga* (Sentencing), Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 1 December 2014.
- Judgment, *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 1 December 2014.

- Judgment, *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 1 December 2014, Dissenting Opinion of Judge Anita Ušacka.
- Judgment, *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 1 December 2014, Partly Dissenting Opinion of Judge Sang-Hyun Song.
- Judgment, *Prosecutor v. Ngudjolo,* Case No. ICC-01/04-02/12*,* ICC, Appeals Chamber, 27 February 2015.

4.4.2. Other Judgments, Decisions, and Orders

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- Decision on Mr Ngudjolo's Request for Review of the Registrar's Decision regarding the Level of Remuneration during the Appeal Phase and Reimbursement of Fees, *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, ICC, Appeals Chamber, 11 February 2014.
- Decision on Sentence pursuant to Article 76 of the Statute, *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, ICC, Trial Chamber I, 10 July 2012.
- Decision on Sentence pursuant to Article 76 of the Statute, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, ICC, Trial Chamber II, 23 May 2014.
- Decision on the Participation of Victims in the Appeal against Trial Chamber II's "Jugement Rendu en Application de l'Article 74 du Statut", *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, ICC, Appeals Chamber, 6 March 2013.
- Decision on the Participation of Victims in the Appeals against Trial Chamber I's Conviction and Sentencing Decisions, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 13 December 2012.
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- Decision Replacing Judges in the Appeals Chamber, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, ICC, Presidency, 19 March 2014.
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- Directions under Regulation 62 of the Regulations of the Court, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 21 December 2012.
- Further Order regarding the Conduct of the Hearing of the Appeals Chamber, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 25 March 2014.
- Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, ICC, Appeals Chamber, 14 December 2006.
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4.5. European Court of Human Rights

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- Judgment, *Abdulgadirov v. Azerbaijan*, Application No. 24510/06, ECtHR, 20 June 2013.
- Judgment, *Agnelet v. France*, Application No. 61198/08, ECtHR, 10 January 2013.

- Judgment, *Al-Khawaja & Tahery v. the United Kingdom*, Applications Nos. 26766/05 & 22228/06, ECtHR, 15 December 2011.
- Judgment, *Altieri v. France*, Cyprus, and Switzerland, Application No. 28140/95, ECtHR, 15 May 1996.
- Judgment, *Arnarsson v. Iceland*, Application No. 44671/98, ECtHR, 15 July 2003.
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- Judgment, *Belziuk v. Poland*, Application No. 23103/93, ECtHR, 25 March 1998.
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4.6. European Commission of Human Rights

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